IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1318

CECLE G. PEARSON,
Appellant

versus

W.P. DODD; ERNESTINE DODD,
his wife; and COLUMBIA GAS TRANSMISSION
CORPORATION,
Appellees.

ON APPEAL FROM A DECISION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

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INTRODUCTION

This is an appeal from a final judgment of the Supreme Court of Appeals of West Virginia filed on December 18, 1975. The appellant submits this jurisdictional statement to show that this Court has jurisdiction of the appeal and that a substantial federal question is presented.

OPINION BELOW

The opinion below by the Honorable Chief Justice Haden of the Supreme Court of Appeals of West Virginia is reported at 221 S.E.2d 171 (W. Va. 1975). A copy of the opinion is set out in full in Appendix A.

The judgment of June 19, 1972, by the Honorable Frank L. Taylor, Judge of the Circuit Court of Kanawha County, West Virginia, incorporated Judge Taylor's letter memorandum of opinion of April 17, 1972. A copy of that judgment and opinion is set out in full in Appendix B.

JURISDICTION

The suit is one to set aside as a cloud upon the title to an oil and gas interest a purported conveyance of such interest by a tax deed under a state statute. The judgment of the Supreme Court of Appeals of West Virginia was filed on December 18, 1975. Notice of Appeal was filed with the Supreme Court of Appeals on February 26, 1976.

The jurisdiction of the Supreme Court to hear this appeal rests upon 28 *U.S.C.* § 1257 (2) or, in the alternative, § 1257 (3).

STATUTES INVOLVED

The case involves the validity of West Virginia Code 1931, §§ 11A-4-12 and 11A-3-8. These statutes are set out in Appendix C.

QUESTIONS PRESENTED

The questions presented by this appeal are:

(a) whether under the requirements of due process of law embodied in the fourteenth amendment to the United States Constitution a state statute may permit, solely by a publication naming the person as an unknown defendant, notice of a tax sale of the

property interest of a person whose name and address is known or very easily ascertainable; and

(b) if such notice is constitutionally deficient, whether a state, consistent with due process, may invoke a statute of limitations to bar such person from attacking the validity of the sale.

STATEMENT OF THE CASE

By a deed from her son, H.C. Pearson, Jr., executed and recorded in 1937, the appellant, Cecle G. Pearson, acquired a full one-fourth interest in all of the oil and gas in sixty-eight acres of land located in Kanawha County, West Virginia. Although the appellant did not change the entry in the land books from her son's name to her own, appellant's husband paid the real estate taxes on her interest from the time of the first assessment in 1938 until 1960. Through an oversight, no taxes were paid on appellant's interest in 1961. As a result of this nonpayment, the assessment on appellant's interest was declared delinquent in 1962.

In 1966, the Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County instituted a suit in the name of the State of West Virginia for the sale of this and other delinquent interests in real property. On April 26 of that year, the Deputy Commissioner purported to convey by a tax deed to appellee W.P. Dodd "68 Acres, 1/8 Acre Oil and Gas Interest . . . being the same property conveyed to H.C. Pearson, Jr. . . ." In 1967, Mr. Dodd and his wife ratified an existing lease upon the sixty-eight acres executed in favor of the United Fuel Gas Company and granted United the right to drill a natural gas well. This well was completed in 1968 and produced an initial open flow of one hundred million cubic feet of gas. Under the terms of the lease, the lessors were each entitled to "their proportionate part of one-eighth of the wholesale market value" of the gas produced.

On July 26, 1968, Mrs. Pearson paid the State Auditor $101.86 and received a Certificate of Redemption of Lands in her name for "68A, 1/4 O & G Interest" in the property in question. She subsequently filed this suit against the Dodds and United Fuel. By an order of the Circuit Court dated July 9, 1971, appellee Columbia Gas Transmission Corporation was substituted as a defendant for United Fuel.

West Virginia Code § 11A-4-12 permits the sale of delinquent property interests upon notice by publication upon "unknown parties who are or may be interested in any of the lands included. . . ." The only notice of the sale in question was given by publication in two local newspapers on April 16 and April 23, 1966. This notice mis-described the interest as "68 Acres, 1/8 Acre Oil and Gas Interest" and listed the former owner as H.C. Pearson, Jr.

The Circuit Court granted judgment for the defendants-appellees. In its letter memorandum of opinion, it held, *inter alia,* that the notice provisions of § 11A-4-12 did not deny the plaintiff-appellant due process of law under the United States Constitution. In affirming the judgment of the Circuit Court, the Supreme Court of Appeals of West Virginia held "that the former owner is not such an interested party in the circuit court sale to invoke the constitutional protections" of procedural due process. The court reached this conclusion by application of West Virginia Code 1931, § 11A-3-8, holding that an owner who failed to redeem her property within the statutory period provided by the section lost all rights of ownership, and hence lost any "significant property interest" sufficient to support a due process challenge. Section 11A-3-8, by its terms, permits the owner of property acquired by the state for disposition at a tax sale to redeem his property within eighteen months of the acquisition by the state.

ARGUMENT

A. WEST VIRGINIA CODE § 11A-4-12 DENIES DUE PROCESS OF LAW TO AN OWNER WHOSE PROPERTY INTEREST HAS BEEN SOLD AT A TAX SALE WHEN THE SOLE NOTICE OF THE SALE IS BY A PUBLICATION NAMING THE OWNER AS AN UNKNOWN DEFENDANT WHERE THE NAME AND ADDRESS OF THE OWNER ARE KNOWN OR VERY EASILY ASCERTAINABLE.

In Part IV of his opinion for the West Virginia Supreme Court of Appeals, Chief Justice Haden implicity recognized, in the absence of a statute of limitations, the constitutional deficiency as applied to the appellant of § 11A-4-12 under the test announced by the Court in *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950):

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

More particularly, this court stated:

> Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.

Id.

The obvious application of the *Mullane* doctrine to the circumstances under consideration here has been noted by the commentators:

> In almost every tax sale case the name and address of the property owner will be readily ascertainable, either from the tax roles, the county land records, or otherwise. A direct application of the *Mullane* doctrine would lead to the conclusion that notice by publication alone is unconstitutional and that some form of personal notice by mail must be provided.

Note, "The Constitutionality of Notice by Publication Tax Proceedings," 84 *Yale L. J.* 1505, 1511 (1975); *accord,* Note, "Due Process in Tax Sales in New York: The Insufficiency of Notice by Publication," *25 Syracuse L. Rev.* 769, 775 (1974); Legg, "Tax Sales and the Constitution," 20 *Okla. L. Rev.* 365, 375 (1967).

In a recent California decision, the court reviewed the application of *Mullane* by this Court and held that landowners whose property had been sold to defendants at a tax sale had been denied due process since notice of the sale had been provided only by publication. *Johnson v. Alma Investment Co.,* 47 Cal. App. 3d 155, 120 Cal. Rptr. 503 (1975). The owners had lived at the same address since 1951 and had purchased property in 1962, which was subject to assessment by the local water district. When the district's assessment roll was compiled in 1964, the owners' address did not appear on the roll since names and addresses of property owners were acquired from the tax roll of the county tax assessor. At the time that roll failed to carry the owners' address, although the address was carried on the records of the tax *collector* as early as 1963.

As a result, notice of the delinquency of the water district assessment was accomplished, pursuant to a state statute, solely by publication, and the property was subsequently sold at a tax sale. The owners brought suit to quiet title against the purchasers at the tax sale. The court of appeal held that to the extent that the code section authorized notice of assessment by publication alone where the address of the owner was known or could be ascertained with reasonable diligence, the section was constitutionally deficient as a denial of due process to the owners. Since, when the water district assessment roll was compiled, the address of the owners was available from the county tax collector's records, the address was ascertainable with reasonable diligence, and the sale of the property was void.

The present case presents similar but even more striking facts than those in *Johnson.* At the time of the tax sale, the appellant had lived at the same address for nearly

twenty years. R. 149. The interest had been recorded in her name since the execution of the deed to her by her son in 1937. In the notice by publication, the appellant's name as well as her address were omitted, and the property interest was incorrectly described. This was hardly "notice reasonably calculated, under all the circumstances," to alert the appellant that she was about to lose her interest for a tax deficiency.

In another decision by a state court, a tax sale of mineral interest was held to be void as a violation of due process under the fourteenth amendment, where the notice of sale, pursuant to a state statute, was by publication only. *Chapin v. Aylward,* 204 Kan. 448, 464 P.2d 177 (1970). The court, applying the *Mullane* test, held that although neither the mineral deed nor the records in the county treasurer's office gave the address of the owners, notice by publication was insufficient where the address could have been discovered from the personal property tax or real estate tax rolls.

Both the *Johnson* and the *Chapin* courts reached their conclusions after reviewing another decision by this Court in the wake of *Mullane.* In that case, *Walker v. City of Hutchinson,* 352 U.S. 112 (1956), this Court held that newspaper publication of condemnation proceedings against a landowner, whose name was known to the city and on the official records, was insufficient notice to meet the requirements of due process. The *Johnson* court also referred to the Court's decision in *Schroeder v. City of New York,* 371 U.S. 208 (1962), in which notice by publication and posting on trees and poles within the vicinity of the owner's land was held to be insufficient notice of condemnation proceedings where the owner's name and address were readily ascertainable from both deed records and tax rolls.

Other post-*Mullane* decisions by this Court also point to the substantiality of the federal question involved in this case. In *Covey v. Town of Somers,* 351 U.S. 141 (1956), notice by publication, mailing, and posting given to an incompetent without a guardian prior to foreclosure of a tax

lien was held insufficient to amount to due process. In the same year, in *Wisconsin Electric Power Co. v. City of Milwaukee,* 352 U.S. 948 (1956), this Court, in light of *Walker,* vacated the judgment of the court below that statutory notice by publication of paving assessments was adequate compliance with the demands of due process.

It is patently clear, therefore, that the notice provisions of the West Virginia statute violate the dictates of this Court's decisions in *Mullane* and its progeny, and violate the due process clause of the fourteenth amendment.

B. WEST VIRGINIA CODE § 11A-3-8 DENIES DUE PROCESS OF LAW TO AN OWNER WHOSE PROPERTY INTEREST HAS BEEN SOLD AT A TAX SALE WHEN THE STATUTE IS INVOKED TO BAR THE OWNER FROM ATTACKING THE VALIDITY OF THE SALE.

In its second aspect, this appeal presents this Court with the precise issue found not to be presented to it in *Paschall v. Christie-Stewart, Inc.,* 414 U.S. 100, 102 n. 4 (1973), namely "[w]hether the alleged lack of constitutionally valid notice would preclude the running of the statute of limitations for an adverse land claim. . . ."

In the *Chapin* decision, discussed in the preceding section, the court directly addressed this issue and held that the Kansas statute of limitations pertaining to actions to set aside a tax sale could not be invoked against the owners who had been denied due process of law by the use of publication notice. This was hardly a novel theory. In the words of one commentator:

> A statute . . . which should make a tax-deed conclusive evidence of a complete title, and preclude the owner of the original title from showing its invalidity, would be void, because being not a law regulating evidence, but an unconstitutional confiscation of property.

2. *T. Cooley, A Treastise on the Constitutional Limitations* 769 (8th ed. R. Carrington 1927).

Another observer has noted the prevalence of such statutes and their potential effect.

> In most, if not all, of the American states there are upon the statute books laws which limit the right of the former owner of land sold for taxes to bring his action to test the validity of the tax title, to a much shorter period than that prescribed by the common law for the trial of titles to land. . . . [T]hey have been so worded that if applied literally, they would make a tax title entirely impervious to attack, after the lapse of the given period, no matter what irregularities or defects may undermine it, and irrespective of the fact of possession or any of the other circumstances thought material in such cases. Notwithstanding the large control of the legislature over remedies and over the limitation of actions, it may well be doubted whether such a result can lawfully be accomplished in all cases.

H. Black, A Treatise on the Law of Tax Titles § 492 (2d ed. 1893).

It is hardly surprising that there exists considerable precedent dating back over a century that due process will not allow a state statute of limitations to be utilized to bar a challenge to the validity of a tax sale. In perhaps the earliest of these decisions, *Groesbeck v. Seeley,* 13 Mich. 329 (1865), the holder of a tax deed brought an action in ejectment against the property owners who offered to show in defense that the taxes for which the lands had been sold were illegal for noncompliance with the statutes. The trial court had barred this defense under the limitations provision of the tax laws. The appellate court held the provision to be invalid as so applied, recognizing the import of a contrary holding:

> If this tax title can be thus made indefeasible against a title in possession, by mere lapse of time, it might as well have been declared so originally. It would in either case be nothing more nor less than depriving

> one of his property without any legal process, and is simply confiscation by ministerial and not judicial action.

Id. at 344.

A similar case came before the high court of a sister state in the following year. In *Baker v. Kelley,* 11 Minn. 480 (1866), the owners brought ejectment against the holders of a tax deed, asserting that the property had not been advertised for sale as required by the statute. As a defense, the holders of the tax deed asserted a limitations statute which barred suits instituted after one year had elapsed since the recording of the tax deed. The court posed the question thusly:

> But suppose it is intended by this law to require the original owner to commence an action within the time fixed or be forever barred from testing or questioning the validity of the assessment or sale? Is such a law sanctioned by the Constitution?

Id. at 495. In answer, the court offered the following quotation from Justice Comstock of the New York Court of Appeals:

> To say, as has been suggested, that the "law of the land," or "due process of law," may mean the very act of the Legislature which deprives the citizen of his rights, privileges or property, leads to a simple absurdity.

Id. at 497. Thus, as Justice Seldon said in the same New York case:

> It follows that a law which, by its own inherent force, extinguishes rights of property or compels their extinction without any legal proceedings whatever, comes directly in conflict with the Constitution.

Id. at 498. The *Baker* court concluded, under these principles, that the limitations provision could not be sustained and that the plaintiff owners had the right to show that the sale was invalid.

In yet another nineteenth century decision, the court held a similar limitations provision to be a denial of due process. *Dingey v. Paxton,* 60 Miss. 1038 (1883), was an action in ejectment by the heirs of the holder of a deed to certain property against the holder of a tax deed. Notwithstanding the fact that the deed was found to be based upon an assessment void for uncertainty in the description of the land, the defendants asserted that the suit was barred by the limitations provision. The court rejected this defense.

The *Dingey* holding was reaffirmed in *Leavenworth v. Claughton,* 197 Miss. 606 20 So. 2d 821 (1945). It was held in that case that a limitations provision of the tax statute which barred any action by a property owner to defeat the title of the state or its patentees was unconstitutional as "an effort at forced conveyance by legislative fiat. That is not due process of law." 20 So. 2d at 822. Thus, the purchaser at an invalid tax sale was not permitted to plead the statute. In the instant case the statute, § 11A-3-8 was not pleaded or asserted as an affirmative defense. (See W. Va. R. C. P. No. 8 (c). requiring specific defenses including a statute of limitations to be pleaded). In this case the Court pleaded this statute of limitations for the appellees; for that matter, under the statute, 11A-3-8, discovered by the Court and turned by the Court into a statute of limitations, the Court held that the former owner was barred even before the suit to sell was instituted, leaving in that case, hardly a justifiable proceeding. Certainly, not a proceeding the dignity of the Court should be allowed to honor.

Relying upon, *inter alia,* Judge Cooley's treatise quoted above and the foregoing cases, the court in *Murrison v. Fenstermacher,* 166 Kan. 568, 203 P.2d 160 (1949), held a state limitations statute similar to those discussed above to be in violation of constitutional due process.

In the present case, the Supreme Court of Appeals of West Virginia has reached a conclusion which is even more of an "absurdity" than those put forth by the holders of tax titles

in the preceding cases. By its interpretation of § 11A-3-8, the West Virginia court has held that an owner of property is barred from asserting the invalidity of a tax sale by the running of a statute of limitations *prior to the sale.* Thus, under the court's holding, Mrs. Pearson was barred from asserting the invalidity of the sale *even before the sale occurred.* The court reached this result by indulging in the fiction that the assessment of a tax delinquency is a "sale" vesting title in the state which triggers the limitations provision of § 11A-3-8. That this is a fiction is indicated by *West Virginia Const.* art. 13, § 4, which provides that delinquent lands "*shall* . . . be sold to the highest bidder." (Emphasis added; the section is set out in full in Appendix C). The acquisition of the lands by the state is merely a step in the process of transferring title to a tax purchaser. By the terms of § 4, the state "shall" sell the land to the highest bidder; it is not empowered to retain the land for its own use. On this point, a quotation from the *Baker* opinion may be helpful.

> Thus far, no reference has been made to the position that the Legislature, by section 2 of said act, divested the plaintiff of his title to the property, and declared it forfeited to the State. . . . If the legislature by this section attempted to do more than confer on the State the power to take such further steps as were necessary in the collection of the delinquent taxes, or in the perfection of tax titles, then it overstepped the limits which the constitution has fixed to its authority.

11Minn. at 499.

It would be strange indeed if a state could bar a property owner from asserting the invalidity of a tax sale of his property based upon constitutionally defective notice by invocation of a statute of limitations which is triggered by such defective notice. It would be stranger still if a state could bar a property owner from asserting the constitutional defect even before it has occurred. Yet this is exactly what the court in this case has purported to do.

CONCLUSION

The West Virginia statutes have been applied by the Supreme Court of Appeals of that state to deny the appellant due process of law as guaranteed by the fourteenth amendment to the United States Constitution. This Court should review and reverse the decision below.

Respectfully submitted,

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APPENDIX

NO. 13257

CECLE G. PEARSON

V.

W. P. DODD, ET AL.
and
COLUMBIA GAS TRANSMISSION CORPORATION

Kanawha County Affirmed

Haden, Chief Justice

1. "To justify the application of the doctrine of *res judicata,* '* * * there must be a concurrence of four conditions, namely: (1) identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons, and of parties to the action; (4) identity of the quality in the person for or against whom the claim is made.' Opinion. *Marguerite Coal Co. v. Meadow River Lumber Co.,* 98 W.Va. 698." *Syllabus, Hannah v. Beasley,* 132 W.Va. 814, 53 S.E.2d 729 (1949).

2. Delinquent lands are those upon which the owners have failed to pay property taxes and which have been listed by the sheriff as delinquent and, at public sale, sold by him to individuals or purchased by him for the State.

3. Forfeited lands are those which the owners have failed to enter for assessment on the land books and for which no property taxes have been paid for five consecutive years; when both events occur, the State's title arises and perfects by operation of law.

4. Under *W.Va. Code* 1931, 11A-4-39a, as amended, an erroneous entry on the land books cannot result in forfeiture provided the identity of the land intended by such entry can be ascertained.

5. Under *W.Va. Code* 1931, 11A-4-33, as amended, a purchaser at a tax sale, who has obtained a deed to the State's title from the deputy commissioner, has a perfect title to the property interest sold by the State, unless the former owner of the interest, being one required by law to have his interest separately assessed and taxed, has done so and has paid all taxes due thereon or unless the rights of such former owner are saved expressly by the prohibition of *W.Va. Code* 1931, 11A-4-27, as amended, or protected by reason of such person's disability, as recognized in *W.Va. Code* 1931, 11A-4-34, as amended.

6. Inasmuch as the primary purpose of the notice requirement contained in *W.Va. Code* 1931, 11A-4-23, as amended, is to encourage attendance and bidding at the tax sale, a failure to comply literally with such provision does not inure to the benefit of a former owner of property sold at the tax sale.

7. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Trust Co.,* 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865, 873 (1950).

8. The Fourteenth Amendment's protection of "property" extends protection to any significant property interest, including statutory entitlements. *Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972).

9. *W.Va. Code* 1931, 11A-3-8, as amended, gives a former owner of delinquent land whose interest is not otherwise saved and protected, a statutory entitlement, that is, a right to redeem the land which he formerly owned, at any time within eighteen months of the date of the State's purchase of the property. If redemption does not occur within such period, then this right no longer exists, because absolute title has vested in the State.

10. The State cannot sell interests in land in an action

authorized by *W.Va. Const.,* Art. XIII, § 4 unless the former owner's interest in property is then irredeemable and the State's title is vested and perfected.

11. *W.Va. Code* 1931, 11A-4-18, as amended, gives a former owner of delinquent land the opportunity to petition the circuit court for permission to redeem such land at any time before confirmation of sale. Under this provision, it is purely discretionary with the court whether to accede to the redemption request.

12. The mere opportunity to redeem under *W.Va. Code* 1931, 11A-4-18, as amended, is extended to a former owner by the Legislature as an act of grace. This opportunity does not give, or restore to, a former owner a significant property interest nor accord him the status of an "interested party" in the circuit court sale, so as to invoke the constitutional protections of due process.

13. "While a court is not compelled to accept legislative statements of intent and findings of facts when the statements contained therein are not warranted in law, such statements are entitled to great weight in support of the presumption that the Legislature does not intend to offend the requirements or inhibitions of the West Virginia Constitution." *Syllabus* point 2., *State ex rel. Goodwin v. Rogers,* W.Va. , 217 S.E.2d 65 (1975).

14. The determination of the State to dispose of its vested interest in forfeited and delinquent lands, to authorize a judicial sale by civil action pursuant to *W.Va. Code* 1931, 11A-4-1, *et seq.,* as amended, and to proceed such action by order of publication in the names of former owners so as to identify the interests to be sold, does not violate the Due Process Clauses of the West Virginia and United States Constitutions, as respects such former owners.

15. *Syllabus* point 9. prefixed to the decision of *Work v. Rogerson,* 149 W.Va. 493, 142 S.E.2d 188 (1965) is disapproved to the extent that its holding fails to distinguish the redemptive right which is a statutory entitlement under *W.Va. Code* 1931, 11A-3-8, as amended, and the mere op-

portunity to petition for redemption which is an extension of legislative grace under *W.Va. Code* 1931, 11A-4-18, as amended.

Haden, Chief Justice:

This is an appeal from a final order of the Circuit Court of Kanawha County which held that the appellant, Cecle G. Pearson, did not own any part of the oil and gas interest contended for in her action to quiet title against the appellees, W. P. Dodd, Ernestine Dodd, his wife, and Columbia Gas Transmission Corporation.

The facts in this case are essentially undisputed. By a deed from her son, H.C. Pearson, Jr., dated February 20, 1937 and recorded August 9, 1937, the appellant acquired a full one-fourth of all the oil and gas in sixty-eight acres of land, known as the Sarah A. Null tract, located in Union District, Kanawha County. The appellant did not enter her name into the land books and thus, the assessment involved in this action appeared under Union District, Kanawha County, as follows:

"1938	O'Dell, W. H. (predecessor in title to H. C. Pearson, Jr.) and H. C. Pearson, Jr. 1/2 O & G Int 68A Wts Martins Br.
1939) thru) 1943)	Pearson, H. C. Jr. 68 A. 1/4 O & G Int Wts Martins Br.
1944) thru) 1957)	Pearson, H.C. Jr. 68 A. 1/8 O & G Int Wts Martins Br.
1958) thru) 1966)	Pearson, H. C. Jr. 68 A. 1/8A O & G Int Wts Martins Br."

Although the tax tickets contained the name of H. C. Pearson, Jr., the senior Mr. Pearson, appellant's husband, paid the taxes for his wife's mineral interest in the Sarah A. Null tract from the time of the first assessment in 1938 until 1960. H. C. Pearson, Jr. died in 1958; the taxes for that year were assessed and paid in his name. The 1959 and 1960 taxes, likewise assessed, were paid also. In 1961, because of an oversight, Cecle Pearson failed to pay the real estate taxes on this interest. As a result, the assessment went delinquent, and in 1962, the property was sold to the State. In 1964, the property was certified by the State Auditor. Two years later the Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County instituted a suit, in the name of the State of West Virginia, for the sale of this and other delinquent lands. By a tax deed, the purchaser, W. P. Dodd, was conveyed "68 Acres, 1/8 Acre Oil and Gas interest, . . . being the same property conveyed to H. C. Pearson, Jr., by W. H. O'Dell . . . in Deed Book 428, at page 53. . . ."

The only notice given of the sale of this delinquent land was by way of publication in the Charleston Daily Mail and the Charleston Gazette on April 16 and April 23, 1966. The public notice misdescribed the interest as "68 Acres, *1/8* Acre oil and gas interest" and listed the former owner as *"H. C. Pearson, Jr."* (Emphasis supplied). The Dodds obtained the tax deed on April 26, 1966 for $30.00. After ratifying a former lease agreement with Columbia Gas, the Dodds granted Columbia Gas the right to drill a gas well in 1967. In late March of 1968, at a cost of $104,500.87, Columbia Gas completed the well on the 68 acres in question with an initial open flow of one hundred million cubic feet of Newburg gas. On July 26, 1968, Cecle G. Pearson paid the State Auditor $101.86 in an attempt to redeem her interest which, she asserted, had forfeited for non-entry for the years 1938 to 1968. Cecle G. Pearson then commenced this action against the Dodds and Columbia Gas on October 15, 1968.

The appellant has assigned several errors as grounds for

reversal, but the ultimate issue in the case remains as the parties agreed by the circuit court order of July 9, 1971:

> "[W]hether or not the plaintiff, Cecle G. Pearson, owns all or any part of the oil and gas interests asserted in the complaint filed herein, and whether or not the tax deed described in the complaint filed in this action and the other instruments based thereon, be set aside as a cloud upon the title of the plaintiff in and to the same oil and gas interest."

For reasons which shall appear, this Court is of the opinion that the appellant owns no part of the mineral interests in the subject property, and thus, that the decision of the Circuit Court of Kanawha County is correct.

The Court believes that the following questions, raised by the appellant, merit our consideration:

1. Whether the suit, entitled *State v. L. (Lemuel) A. Whittington, et al.*, upon which the tax deed is based is *res adjudicata* to the interest of the appellant?

2. Whether a forfeiture due to non-entry, or a delinquency due to non-payment, occurred?

3. Whether various mistakes, concededly made during the tax sale proceeding, rendered such proceeding void or whether these mistakes were cured by *W.Va. Code* 1931, 11A-4-33, as amended?

4. Whether *W.Va. Code* 1931, 11A-4-12, as amended, allowing a "delinquent sale" action to proceed against a former owner, who has notice of the action, if at all, through an order of publication, merely, is unconstitutional?

I

Appellees assert that the circuit court suit for the sale of lands, entitled *State v. L. (Lemuel) A. Whittington, et al.* was *res adjudicata* to the action brought by the appellant below. Appellees cite *Robinson Improvement Co. v. Tasa Coal Co.*, 143 W.Va. 293, 101 S.E.2d 67 (1957) for this proposition. *Robinson*, however, is not controlling because the criteria for *res adjudicata, succinctly set forth in*

Hannah v. Beasley, 132 W.Va. 814, 53 S.E.2d 729 (1949), are not present:

> "To justify the application of the doctrine of *res judicata*, '* * * there must be a concurrence of four conditions, namely: (1) identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons, and of parties to the action; (4) identity of the quality in the persons for or against whom the claim is made.' Opinion. *Marguerite Coal Co. v. Meadow River Lumber Co.*, 98 W.Va. 698." *Id. syllabus.*

Because the foregoing conditions were not satisfied, the circuit court below had the power to entertain the suit brought by the appellant, and consequently, this Court has the authority to consider the merits of this case on appeal.

II

By way of introduction, a lead article, entitled "Taxation and Land Titles Under Article XIII of the West Virginia Constitution," 65 *W.Va. L.Rev.* 263 (1963), provides a simple and workable explanation of what the terms, "delinquency" and "forfeiture" mean:

> "*Delinquent Lands:* Delinquent lands are those upon which the owner failed to pay taxes and which have been listed as delinquent by the county sheriff and purchased by him for the state at public sale. [or sold by him to "private" purchasers, i.e. individuals, at the sale. *W.Va. Code* 1931, 11A-3-4, as amended]. . . . The terms 'delinquent' and 'forfeited' are vastly different.
>
> "*Forfeited Lands:* Lands become forfeited when the owners fail to enter them for taxation on the land books of the proper counties and no taxes are paid on them for five consecutive years. This land is forfeited to the state by operation of law and no formalities are necessary to convey title to the state. Lands are forfeited only for non-entry, not for non-payment of taxes." *Id.* at 268-69.

The distinction between the two was first recognized by this Court in *Waggoner v. Wolf,* 28 W.Va. 820, 1 S.E.25 (1886), when it stated:

> "There is a vast difference between delinquency and forfeiture. The former means simply that the owner has failed to pay the taxes due on his land, and in consequence it has been returned delinquent and is subject to the State's lien for the taxes and liable to be sold therefor. But by forfeiture the former owner is entirely divested of all his interest in the land and the title thereto becomes absolutely vested in the State. By reason of the delinquency the State may sell the land under her lien for taxes, while a forfeiture vests the absolute title in the State. *Id.* at 828.

The facts reveal that the name of Cecle G. Pearson, the appellant, who obtained the subject interest in 1937, was not entered into the land books from 1938 to 1966. Rather her son's name, H. C. Pearson, Jr., from whom she received the property, remained on the land books during this entire period. If Mrs. Pearson's failure from 1938 to 1943 to enter her own name constituted a forfeiture, then the State automatically would have acquired ownership in the subject interest in 1943. The subsequent delinquency sale in 1962 would have been meaningless. See *Bailey v. Baker, et al.,* 137 W.Va. 85, 68 S.E.2d 74 (1951).

Forfeiture has been described as "a harsh, even dreadful, remedy"; courts generally disfavor it "and never apply it except where the law clearly warrants." *State v. Cheney, et al.,* 45 W.Va. 478, 480, 31 S.E. 920, 921 (1898). In fact, there exists a presumption against a forfeiture of title for non-entry until overthrown by the State. *State v. Hines-Bailey Corp.,* 103 W.Va. 180, 136 S.E. 780 (1927); *State v. Bear Mountain Coal Co.,* 99 W.Va. 183, 128 S.E. 84 (1925); *White Flame Coal Co. v. Burgess,* 86 W.Va. 16, 102 S.E. 690 (1920); *Wildell Lumber Co. v. Turk,* 75 W.Va. 26, 83 S.E. 83 (1914). Pertinent to the present facts, this Court has held that entry on the land books in the name of the former owner, under the same title,

prevents forfeiture. *Blake v. O'Neal,* 63 W.Va. 483, 61 S.E. 410 (1908). See also, *Stiles v. Layman,* 127 W.Va. 507, 33 S.E.2d 601 (1945). Although the facts in *Blake* are not identical to those in the present case, the similarities make the *Blake* decision persuasive. In both cases, an entry, albeit erroneous, on the land book did exist in the name of a relative, who was the former owner; furthermore, taxes were being paid by the true owners despite the erroneous entries.

These holdings are consistent with the Legislature's clear intent in *W.Va. Code* 1931, 11A-4-39a, that no entry shall result in a forfeiture "provided the identity of the land intended by such entry can be ascertained." This is true, despite errors in "the way in which the name of the owner, the area, the lot or tract number or reference, the local description, the statement of the interest or estate or other particulars are stated." *Id.* for these reasons, this Court is of the opinion that a forfeiture did not occur. Thus, title remained in Cecle G. Pearson until 1962 when the interest was sold to the State because of the delinquency occurring in 1961.

III

The appellant has asserted, in the alternative, that if there was no forfeiture, then the various mistakes made during the tax sale proceeding, resulting from delinquency, constituted a total failure of the deputy commissioner's duties, voiding the tax deed acquired by the Dodds. *W. Va. Code* 1931, 11A-4-33, as amended, which cures mistakes made in the tax sale proceeding, provides:

> "Whenever, under the provisions of this article, a purchaser, his heirs or assigns, shall have obtained a deed for any real estate from the deputy commissioner, he or they shall thereby acquire all such right, title and interest in and to the real estate as was, at the time of the execution and delivery of the deed, vested in or held by the State or by any person who was entitled to redeem, unless such person is one who,

being required by law to have his interest separately assessed and taxed, has done so and has paid all the taxes due thereon, or unless the rights of such person are expressly saved by the provisions of sections twenty-seven or thirty-four [§ 11A-4-27 or 11A-4-34] of this article. The deed shall be conclusive evidence of the acquisition of such title. The title so acquired shall relate back to the date of the sale.

"Except as otherwise provided in this section, no irregularity, error or mistake in respect to any step in the procedure leading up to and including confirmation of the sale or delivery of the deed shall invalidate the title thereby acquired."

This curative provision is nearly identical in language to *W. Va. Code* 1931, 11A-3-29, as amended, which is entitled "Effect of irregularity on title acquired by purchaser."[1] This Court has held that such provisions apply "only to voidable deeds and not to deeds which are void because of jurisdictional defects." *Shaffer v. Mareve Oil Corp.*, W.Va. , 204 S.E.2d 404, 408, 409 (1974). See also, *Gates v. Morris*, 123 W.Va. 6, 13 S.E.2d 473 (1941).

The purposes of these particular provisions and of Chapter 11A, Articles 3 and 4 in general, are explicitly stated in *W.Va. Code* 1931, 11A-3-1 and 11A-4-1 as respectively amended:

"In view of the paramount necessity of providing regular tax income for the State, county and municipal

[1]"No irregularity, error or mistake in respect to any step in the procedure leading up to and including delivery of the tax deed shall invalidate the title acquired by the purchaser unless such irregularity, error or mistake is, by the provisions of sections sixteen, thirty, thirty-one, or thirty-two [§§ 11A-3-16, 11A-3-30, 11A-3-31 or 11A-3-32] of this article, expressly made ground for instituting a suit to set aside the sale of the deed.

"This and the preceding section [§ 11A-3-28] are enacted in furtherance of the purpose and policy set forth in section one [§ 11A-3-1] of this article."

governments, particularly for school purposes; and in view of the fact that tax delinquency, aside from being a burden on the taxpayers of the State, seriously impairs the rendering of these essential services; and in view of the further fact that delinquent land, with its attendant problems made acute by the events of the past decade, not only constitutes a public liability, but also represents a failure on the part of delinquent private owners to bear a fair share of the costs of government; now, therefore, the legislature declares that its purpose in the enactment of this and the following article [§ 11A-4-1 et seq.] is threefold: First, to provide for the speedy and expeditious enforcement of the tax claims of the State and its subdivisions; second, to provide for the transfer of delinquent lands to those more responsive to, or better able to bear, the duties of citizenship than were the former owners; and third, in furtherance of the policy favoring the security of land titles, to establish an efficient procedure that will quickly and finally dispose of all claims of the delinquent former owner and secure to the new owner the full benefit of his purchase."

"In furtherance of the policy declared in section one [§ 11A-3-1], article three of this chapter, it is the intent and purpose of the legislature to establish a judicial proceeding for the sale of land for the school fund, which will be as expeditious, inexpensive and informal as possible without violating any claim which may fairly and properly be made on behalf of the former owner . . . . "

The appellant asserts that the following errors were so pervasive as to constitute a jurisdictional defect, rendering void the tax sale to the Dodds: (1) the notice by publication contained the wrong name of the former owner; (2) it described the land improperly; (3) it listed the size of the land incorrectly; and (4) only ten days notice of the circuit court sale was given instead of the fifteen required under *W.Va. Code* 1931, 11A-4-23, as amended.

Individually, the first three mistakes have been held by this Court to be cured by predecessor statutory provisions. A misnomer of the former owner did not void the tax sale in *Jarrett v. Kimbrough*, 87 W.Va. 643, 105 S.E. 918 (1921), or in *Hamill v. Glover*, 74 W.Va. 152, 81 S.E. 970 (1914); a misdescription of a lot was held to be cured in *Matheny v. Jackson*, 83 W.Va. 553, 98 S.E. 620 (1919); and a misdescription of the amount of land has been said to be cured in *Leach v. Weaver*, 89 W.Va. 49, 108 S.E. 494 (1921), in *Robey v. Wilson*, 84 W.Va. 738, 101 S.E. 151 (1919), and in *Fleming v. Charnock*, 66 W.Va. 50, 66 S.E. 8 (1909).

Furthermore, the Legislature has been clear in revealing what it considers to be curable. With regard to the first error, i.e. the naming of H. C. Pearson, Jr. instead of Cecle G. Pearson, *W.Va. Code* 1931, 11A-4-12, as amended, specifically provides "that failure to name any such person as a defendant shall in nowise affect the validity of any of the proceedings . . . . " As previously noted, *W.Va. Code* 1931, 11A-4-39a, as amended, considers these types of mistakes as not being so serious as to result in forfeiture. By analogy, such mistakes do not render the tax sale proceeding void. This is logical and fair in view of the fact that the appellant paid tax tickets for several years under the name of her son. She had ample opportunity to cure these mistakes herself; at any time, she could have notified the assessor and tax collecting officials of the proper entry and description of her interest, as the law requires. See *W.Va. Code* 1931, 11A-4-2, as amended.

Neither is the error in the giving of only ten days notice so crucial as to affect the validity of the tax sale proceeding. As correctly pointed out in the appellees' brief, the primary purpose of the notice requirement in *W.Va. Code* 11A-4-23, as amended, is "[i]n order to encourage attendance and bidding at the sale" and not to notify the former owner as such.

Thus, this Court is of the opinion that the errors complained of were cured by *W.Va. Code* 1931, 11A-4-33, as amended.

IV

The appellants challenge the constitutionality of *W.Va. Code* 1931, 11A-4-12, as amended, asserting that it is violative of the due process clause of the Fourteenth Amendment in that it provides for service of process upon former owners by publication only:

> "Upon the institution of a suit as provided in section ten [§ 11A-4-10] of this article, the clerk of the circuit court shall enter an order of publication, without the filing of any affidavit by the deputy commissioner as required in other cases. Such order of publication shall give the style of the suit, as, State of West Virginia v. A. B. et al.; shall state that the object of the suit is to obtain a decree of the circuit court ordering the sale for the benefit of the school fund of all lands included in the suit; shall list all such lands, setting forth as to each item its local description, the former owner in whose name the land was forfeited, or was returned delinquent and sold, or escheated, as the case may be, and the names of such other defendants as may be interested therein; and shall require all the named defendants, and all unknown parties who are or may be interested in any of the lands included in the suit to appear within one month after the date of the first publication thereof and do what is necessary to protect their interests.
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> "The order shall be published as a Class III-O legal advertisement in compliance with the provisions of article three [§ 59-3-1 et seq.], chapter fifty-nine of this Code, and the publication area for such publication shall be the county. The cost of such publication shall be charged ratably to each item listed in the suit, and shall be taxed to the State as part of its costs in the suit and paid as hereinafter provided.
>
> "In view of the fact that the State has absolute title to all forfeited land, to all land sold to the State for nonpayment of taxes and become irredeemable, to all

escheated land, and to all waste and unappropriated land, and must under the Constitution have such an absolute title before the land may be sold for the benefit of the school fund; and in view of the fact that the former owner of any such land, or any person claiming under him, has no further interest therein nor rights in respect thereto except such privilege of redemption as may be extended to him by the legislature as an act of grace; and in view of the further fact that all parties known and unknown who may claim an interest in any of the lands included in the suit are given notice thereof by the order of publication provided for above; therefore, the legislature deems it both expedient and necessary to provide that failure to name any such person as a defendant shall in nowise affect the validity of any of the proceedings in the suit for the sale of the State's title to such land; and in view of the fact that the supreme court of appeals in a decision just rendered has held that there is no constitutional requirement that the former owner or any other interested person be personally served with process in a suit for the sale for the benefit of the school fund of lands that are and must be the absolute property of the State; and in view of the further fact that in its last previous enactment of this section the legislature had no intention of requiring that personal service of process on named defendants in such a suit should be a mandatory condition precedent to the validity of any step or proceeding in such suit, but on the contrary expressly stated that failure to serve the summons on any named defendant should in nowise affect the validity thereof; now therefore, the legislature also deems it both expedient and necessary to provide that the failure to obtain such personal service on any named defendant in any suit instituted under the provisions of this article prior to the effective date hereof [March 11, 1949] shall in no way affect the validity of any step or proceeding in any such suit or the validity of the title acquired by the purchaser of

land sold under any decree made or to be made in any such suit."

The very similar predecessor statute was attacked as unconstitutional in the case of *State v. Simmons,* 135 W.Va. 196, 64 S.E.2d 503 (1951), but the Court upheld the statute declaring it not to be "violative of the due process or other provisions of the Constitution of the United States or of the Constitution of West Virginia." *Id., syllabus* point 1. The *Simmons* Court reviewed West Virginia's legislative and judicial history in this very difficult area of land titles and taxation, and we need not elaborate any further.[2] Appellant asserts, however, that the *Simmons* case is outmoded in view of the recent United States Supreme Court cases (i.e. *Sniadach, Fuentes,*[3] etc.) that have extended the Fourteenth Amendment's procedural due process guarantees of reasonable notice and opportunity to be heard. Appellant relies heavily upon the case of *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), which was decided nine months prior to *Simmons* and of which the *Simmons* Court failed to take note. The appellant contends that *W.Va. Code* 1931, 11A-4-12, as amended, does not meet the adequacy of notice test established in *Mullane*. In *Mullane*, the Court stated that;

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[2]For a more detailed account of West Virginia's unique problems during its early history, see "Taxation and Land Titles Under Article XIII of the West Virginia Constitution," 65 *W.Va. L.Rev.* 263 (1963). By way of illustration, this Court in describing the situation in West Virginia in 1871, stated that the "'uncertainty and confusion of the land titles baffles the investigation and defies the ingenuity of the most assidious and astute . . .'" *Id.* at 267, quoting *Twiggs v. Chevallie,* 4 W.Va. 463, 469 (1871). See also, Colson, "Service of Process In A Delinquent Lands Proceeding - A Suit That Is Not A Suit," 54 *W.Va. L.Rev.* 55 (1951), wherein the delinquent land problems in West Virginia in the 1940s are fully developed, being described as "comparable to that faced by the state immediately after its formation." *Id.* at 56. See also *W.Va. Code* 1931, 11A-4-39, as amended.

[3]*Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969); *Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972).

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.*,at 314 of the United States Report.

In establishing this test, the *Mullane* Court generally criticized the giving of notice by publication and specifically condemned such notice where the names and addresses of interested parties are known or easily ascertainable.

In establishing the test for adequacy of notice, the *Mullane* Court minimized the historical significance given to the type of action involved with regard to notice requirements. Explaining that the distinctions between *in rem* and *in personam* were ancient and unclear, the Court concluded:

> "[W]e think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state." *Id.*, at 312 of the United States Report.

This is helpful in our consideration of the present case because the sale of lands for the school fund under *W.Va. Code* 1931, 11-4-1, *et seq.*, as amended, has been described in a very indistinct manner by the West Virginia Court as "a proceeding *inter partes*, and substantially one *in rem*."[4] *State v. Simmons, supra*, at p. 206 of the West Virginia

[4]In analyzing this statement, one commentator has remarked: "It is obviously not a suit *inter partes* in the normal sense of the term because there is no necessary and interested party defendant. It is equally not a proceeding *in rem* to effectuate a forfeiture of title to the state, or to foreclose the interest or the rights of any interested parties, because there are none. Nor is it a suit *quasi in rem* which is a cross between the two. Probably the most than can accurately be said is that as a judicial proceeding this one is *sui generis*." Colson, *supra*, at 64 (1951).

Report. Thus, the *Mullane* test for adequacy of notice substantially discourages judicial reliance upon semantical distinctions in the granting or denying of relief based upon the characterization of the type of action involved.

Of course, the *Mullane* due process requirement, that notice be reasonably calculated to apprise "interested parties" of the pendency of action, presupposes under the Fourteenth Amendment that the parties retain or have some property interest to be affected by the action. In other words, if a person has no interest in the land that is being sold for the school fund, then he has no constitutional right to receive the kind of notice that *Mullane* demands. What exactly is meant by an "interested party" is not certain; however, the United States Supreme Court in *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) did shed further light on the matter when it stated:

> "The Fourteenth Amendment's protection of 'property' . . . has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to any significant property interest, . . . including statutory entitlements." *Id.* at p. 87 of the United States Report.

Thus, the crucial question for our determination is whether the prerogative contained in *W.Va. Code* 1931, 11A-4-18, as amended,[5] gives a former owner of property a significant interest, or something less, in the circuit court sale of such property. Under this provision, a former owner of delinquent land is given the opportunity to apply at any time before confirmation of sale for permission to redeem

[5]*W.Va. Code* 1931, 11A-4-18, as amended, provides in pertinent part: "The former owner of any forfeited or delinquent land, or any other person who was entitled to redeem such land under the provisions of section eight [§ 11A-3-8], article three of this chapter, may file his petition in such suit with the circuit court . . . at any time before confirmation of sale thereof requesting permission to redeem such land to the extent that title thereto remains in the State."

the interest formerly owned by him. This provision, however, does not confer on former owners an automatic right to redeem, and for this reason must be distinguished from *W.Va. Code* 1931, *11A-3-8, as amended,*[6] which grants a former owner of delinquent land the right to redeem at any time within eighteen months after the date of the purchase by the State.

A great deal of confusion exists in this area, we believe, because historically this Court has considered redemption in general terms. Rarely has this Court acknowledged the distinction between *W.Va. Code* 1931, 11A-3-8 and 11A-4-18, as respectively amended. As a result, this Court has referred to redemption generally as a "right" in several cases, as a "privilege" in others, and as a "right or privilege" in still others. Two lines of West Virginia cases developed from this confusion: one, holding that the "right" to redeem was a substantial property right to be protected by the courts; the other, regarding redemption as a mere privilege or grace accorded by the State which, at any time would be restricted or revoked at the pleasure of the Legislature. See *State v. Simmons, supra,* at 215-217. The *Simmons* Court was aware of the distinctions [between *Code,* 11A-3-8 and 11A-4-18, *supra*] but failed to observe them in its analysis. The *Simmons* Court believed that "the exact character of the right or the privilege of redemption is unimportant or inconsequential," (*Id.* at 216, 217) but this is not true in light of the previous quote from *Fuentes v. Shevin, supra.*

Two opinions subsequent to *Simmons* compounded the confusion with respect to what exactly is conferred by

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[6] *W.Va. Code* 1931, 11A-3-8, as amended, provides in pertinent part: "The former owner of any real estate so purchased by the State, or any other person who was entitled to pay the taxes thereon, may redeem such real estate from the auditor at any time within eighteen months after the date of such purchase. Thereafter such real estate shall be irredeemable and subject to transfer or sale under the provisions of sections 3 and 4, article XIII of the Constitution."

these provisions. First, in the case of *Beckley v. Hatcher,* 136 W.Va. 169, 67 S.E.2d 20 (1951); this Court made the following ambiguous statements;

> "The former owners, under the provisions of the statute mentioned above, [*W.Va. Code* 1931, 11A-3-8, as amended] did not own the property against which the assessment was made, but only had the privilege of redeeming the same as a matter of grace. (citations omitted) The privilege of redeeming the land was ended upon the confirmation of the sale in the suits brought for the benefit of the school fund. See *State v. Gray,* 132 W.Va. 471, 52 S.E.2d 759; Sec. 33, Art. 4, Chapter 160, Acts of the Legislature, 1947." *Id.,* at p. 175 of the West Virginia Report.

In the first sentence, the Court held that the method provided a former owner to redeem under *W.Va. Code* 1931, 11A-3-8, as amended, was a "privilege." In the second sentence, the Court explained that this privilege ended upon the confirmation of sale in the suits brought for the benefit of the school fund, (citing by mistake *W.Va. Code* 1931, 11A-4-33, as amended, instead of *W.Va. Code* 1931, 11A-4-18, as amended). The point is that, by labelling redemption a "privilege" in both instances, the Court, impliedly, has equated the right to redeem [under *Code,* 11A-3-8, *supra*] with the opportunity to apply for permission to redeem [under *Code,* 11A-4-18, supra].

As a further example, the Court in *Work v. Rogerson,* 149 W.Va. 493, 142 S.E.2d 188 (1965) also misconstrued these provisions, in a *syllabus* point, as creating entitlements of equal merit. On this occasion, the Court described both statutory means of redemption as "rights:"

> "Under the provisions of Code, 1931, 11-10-30 (now appearing in revised form as Code, 11A-3-8), property sold by the sheriff for nonpayment of taxes and purchased by the state became irredeemable at the expiration of one year [now eighteen months] from the date of such sale but the right to redeem arose again under the provisions of Code, 1931, 37-3-29 (now

> appearing in revised form as Code 11A-4-18), upon the institution of a suit by the commissioner of school lands to sell the property; and the right to redeem existed and continued until a sale and until a decree for the confirmation of the sale was made and entered by the court in such a suit, whether the state had obtained title to the property by purchase at a sheriff's sale or by forfeiture for nonentry." *Syllabus* point 9., *id.*

Although the Court's opinion in *Rogerson* does not support *syllabus* point 9., *id.*, we are impelled to disapprove the broad holding of this *syllabus* point because of the holdings which follow.

It is our belief, and we so hold, that [under *Code*, 11A-3-8, *supra*] a former owner possesses a statutory entitlement, i.e. a right to redeem at any time within eighteen months of the date of the State purchase. If, however, redemption does not occur during this period, then the statutory entitlement no longer exists because absolute title has vested in the State. Only at this latter point in time is the State permitted by *W.Va. Const.*, Art. XIII, §§ 3 and 4 to institute a suit to sell lands for the school fund. *State v. Gray*, 132 W.Va. 472, 52 S.E.2d 759 (1949); *State v. Blevins*, 131 W.Va. 350, 48 S.E.2d 174 (1948); *State v. Farmers Coal Co.*, 130 W.Va. 1, 43 S.E.2d 625 (1947). Once this suit is commenced, a former owner [under *Code*, 11A-4-18, *supra*] has only the opportunity to petition as a "privilege of redemption." But since it is purely discretionary with the court under *W.Va. Code* 1931, 11A-4-18, as amended,[7] whether to accede to the redemption request, actually it is not accurate to refer to the former owner as possessing a "privilege" of redemption.

In any event, the point of this lengthy, but necessary, discussion is to clarify the interest of the former owner

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[7] *W.Va. Code* 1931, 11A-4-18, as amended, provides in pertinent part, that "[t]he court . . . *may* by proper decree, *permit* the petitioner to redeem the land . . . . " (Emphasis supplied).

[under *Code*, 11A-4-18, *supra*] in the circuit court sale of the State's title to his former property. At the time of the circuit court proceeding, the State has absolute title in the subject property; the former owner has no ownership at all.[8] Nor does such former owner have a statutory right to redeem. The Legislature, by its statement of intent and policy found in the last paragraph of *W.Va. Code* 1931, 11A-4-12, as amended, has been explicit in this regard. The former owner's opportunity to redeem is "extended to him by the legislature as an act of grace;" furthermore, "there is no constitutional requirement that the former owner . . . be personally served with process." *Id.* With respect to these statements, this Court recognizes the general rule stated in *State ex rel. Goodwin v. Rogers*, W.Va. , 217 S.E.2d 65 (1975) that:

> "While a court is not compelled to accept legislative statements of intent and findings of facts when the statements contained therein are not warranted in law, such statements are entitled to great weight in support of the presumption that the Legislature does not intend to offend the requirements or inhibitions of the West Virginia Constitution." *Id., syllabus* point 2.

The foregoing has particular application when the subject—the grace extended by the legislative body—, is a matter of pure legislative prerogative.

Therefore, it is our opinion, and we so hold, that the former owner is not such an interested party in the circuit court sale to invoke the constitutional protections. The

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[8] We are aware that West Virginia Constitution, Article XIII, Section 5, gives a former owner the right "to receive the excess of the sum for which the land may be sold over the taxes charged . . . . " But this interest has been held consistently to give a former owner an interest in personal property only, and consequently, not to give him any interest in the land or any right to be a party to the proceedings for the sale of such land. *State v. Gray*, 132 W.Va. 472, 52, S.E.2d 759 (1949); *State v. Blevins*, 131 W.Va. 350, 48 S.E.2d 174 (1948); *McClure v. Maitland*, 24 W.Va. 561 (1884).

procedural due process guarantees found in such cases as *Mullane, Fuentes, North Georgia Finishing v. Di-Chem* and *Payne v. Walden,*[9] etc., do not extend so broadly as to embrace parties without a significant property interest.

Thus, in the final analysis, the conclusion reached in *State v. Simmons, supra*, still holds true:

> "In a suit to sell forfeited and delinquent lands for the benefit of the school fund, instituted under the provisions of Chapter 160, Acts of the Legislature, 1947, Regular Session, the former owner of such lands, who is named as a defendant in such suit, whether a resident or a nonresident of this State, may be proceeded against by an order of publication; and such procedure is not violative of the due process or other provisions of the Constitution of the United States or of the Constitution of West Virginia." *Id., syllabus* point 1.

Further, since forfeiture did not occur, and the tax sale proceeding was valid, and the former owner's opportunity to redeem ended upon the "confirmation of the sale" to the Dodds [under *Code*, 11A-4-18, *supra*], the appellant's payment of $101.86 to the State Auditor was no more than a colorable attempt to redeem which did not create or restore a significant property interest.

This opinion is intended to clarify the cases of *State v. Gray, supra, State v. Simmons, supra, Davis v. Hylton,* 135 W.Va. 815, 65 S.E.2d 287 (1951), *Beckley v. Hatcher, supra*, and *Work v. Rogerson, supra*, all of which failed to distinguish between a former owner's right to redeem under *W.Va. Code* 1931, 11A-3-8, as amended, and a former owner's opportunity to petition to redeem under *W.Va. Code* 1931, 11A-4-18, as amended. It is also meant to remove any implication contained in *State v. Mason,*

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[9] *Mullane v. Central Hanover Trust Co., supra; Fuentes v. Shevin, supra; North Georgia Finishing v. Di-Chem,* 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975); *State ex rel. Payne v. Walden,* W.Va. , 190 S.E.2d 770 (1972).

W.Va. , 205 S.E.2d 819, 823 (1974), that *W.Va. Code* 1931, 11A-4-18, as amended, provides a former owner the *right* to redeem. Cases decided by this Court, which dealt with interpretation of statutes in effect prior to March 8, 1947, are inapposite to the question considered on this appeal, as those statutes were substantially different from those presently interpreted.

Within rational constraints, this Court has considered carefully every assignment of error placed before us by the appellant. Likewise, we have attempted to respond to all substantial contentions and legal propositions advanced by the excellent and exhaustive brief submitted by appellant's counsel. We have determined that the forceful arguments advanced to restore the property interest of a former owner must, necessarily, fall before compelling State interests,—often recognized in prior decisions and tenaciously maintained in statements of legislative policy—, to resolve uncertainties in land titles and to protect the State's revenues derived from land usage taxation. In this endeavor, we have intended to balance delicately the interests of the individual with those of all the State's citizenry, within the constitutional parameters of due process.

For the reasons herein stated, the final order of the Circuit Court of Kanawha County is affirmed.

Affirmed.

IN THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA

CECLE G. PEARSON
Plaintiff,

V.

W. P. DODD
ERNESTINE DODD, his wife; and
COLUMBIA GAS TRANSMISSION
CORPORATION, a corporation,
Defendants.

CIVIL ACTION NO. 8310

JUDGMENT

This action came on to be heard by the Court upon agreed order by all of the parties that there is no just reason for delay in determining whether or not the plaintiff, Cecle G. Pearson, owns all or any part of the oil and gas interest asserted in the complaint filed herein, and whether or not the tax deed described in the complaint filed in this action and the other instruments based thereon, be set aside as a cloud upon the title of the plaintiff in and to the said oil and gas interest; and, the Court on April 17, 1972, having directed the entry of judgment in accordance with the Court's letter memorandum of opinion;

It is ORDERED that the Court's letter memorandum of opinion dated April 17, 1972, addressed to counsel of record for the parties, be made a part of the record as and for the Court's findings of fact and conclusions of law thereon; and

It is further ORDERED AND ADJUDGED in conformity with said findings of fact and conclusions of law that the plaintiff, Cecle G. Pearson, owns no part of the oil

and gas interest assorted in the complaint filed in this action, and that the tax deed described in the complaint filed in this action, and the other instruments based thereon, should not be set aside as a cloud upon the title of the plaintiff in and to said oil and gas interest; and that defendants recover from plaintiff statutory costs in the prosecution of their defense.

To which action of the Court is granting judgment to the defendants, the plaintiff objected and excepted.

This 19th day of June, 1972.

ENTER:

s/ Frank L. Taylor
Judge

PREPARED BY:

s/ Wm. Roy Rice
Attorney for Columbia Gas
Transmission Corporation

APPROVED BY:

s/ William E. Hamb
Counsel for Defendants,
W. P. Dodd and Ernestine
Dodd, his wife

s/ Rex Burford
Counsel for Plaintiff,
Cecle G. Pearson

STATE OF WEST VIRGINIA
THIRTEENTH JUDICIAL CIRCUIT
KANAWHA COUNTY COURTHOUSE
CHARLESTON, WEST VIRGINIA 25301

April 17, 1972

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Gentlemen:

Cecle G. Pearson vs. W. P. Dodd, Ernestine Dodd, his wife; and Columbia Gas Transmission Corporation, a corporation-Civil Action No. 8310

By the agreed order of July 9, 1971, the "central issue" in this case, to-wit: "* * * whether or not the plaintiff, Cecle G. Pearson, owns all or any part of the oil and gas interest asserted in the complaint filed herein, and whether or not the tax deed described in the complaint filed in this action and the other instruments based thereon, be set aside as a cloud upon the title of the plaintiff in and to the said oil and gas interest", was submitted for decision upon the stipulations filed, the interrogatories and answers thereto, and the depositions of Myron Maurice Miller, Joseph Calvin Crim, Cecle G. Pearson and Henry Clinton Pearson.

The mineral interest claimed by the plaintiff is described in paragraph 1 of the complaint as "one- fourth (1/4th) of all the oil and gas and gasoline, and oil and gas substances in and underlying all that certain tract or parcel of land situate, lying and being near the source of the waters of Martin's Branch, in Union District, Kanawha County, West Virginia, more particularly described as follows, to-wit: * * * * *." Said mineral interest is alleged in paragraph 2 of said complaint to be that which was conveyed to the plaintiff by H. C. Pearson, Jr. by deed dated February 20, 1937, and recorded in the office of the Clerk of the County Court of Kanawha County in Deed Book 436, at page 110.

The tax deed in question is referred to in paragraph 3 of the complaint, as follows:

> "3. By purported tax deed from William B. Maxwell, Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia, to one of the defendants, W. P. Dodd, which deed bears the date June 1, 1966, and which is duly of record in the aforesaid Clerk's office in Deed Book 1467, at page 378, the said William B. Maxwell, Deputy Commissioner, attempted to convey unto one of the defendants, W. P. Dodd, the mineral interest of the said H. C. Pearson, Jr. in land more particularly described as follows:
>
> "68 Acres, 1/8 Acre oil and gas interest, Waters Martins Branch, Union District, Kanawha County, West Virginia, being the same property conveyed to H. C. Pearson, Jr. by W. H. O'Dell and Minerva E. O'Dell, his wife, by deed dated February 8, 1937, and of record in the office of the Clerk of the County Court of Kanawha County, West Virginia, in Deed Book 428, at page 53, reference to which deed is here made for a more particular description of said property."

The complaint further alleges that the interest of H. C. Pearson, Jr. was "purportedly sold to the State of West Virginia in the year 1962 for the nonpayment of property

taxes thereon for the year 1961" by William B. Maxwell, and notes that defendant W. P. Dodd is contending that said deed from Maxwell conveyed to him one-fourth of all the oil and gas, etc. owned by the plaintiff and described in the first paragraph of the complaint. The complaint, accordingly, asserts that Dodd's claim is annoying and vexatious to plaintiff's title, and thereby constitutes a cloud upon her clear and perfect title to the mineral interests.

It is asserted in paragraph 6 of the complaint that said "purported" delinquent tax sale was a nullity; and that the "purported deed and the purported suit by William B. Maxwell, Deputy Commissioner, was a nullity and that the deed from William B. Maxwell, Deputy Commissioner, to the defendant, W. P. Dodd, is a nullity and includes no part of the aforesaid land owned by the plaintiff."

While there is only one "central" issue in this case, many ancillary issues have been raised. Counsel for the plaintiff, in the memorandum submitted on August 16, 1971, under the category of *"ISSUES"*, makes eight principal contentions with regard to the "purported" sale of said mineral interest, several of which are further subdivided into more specific assertions or issues. In addition thereto, the defendants have raised questions concerning this proceeding which were not discussed in plaintiff's initial brief. While I have considered all such contentions and arguments presented in the briefs, I shall attempt herein only to set forth those reasons which, in my opinion, are most pertinent to the decision reached.

The first portion of the plaintiff's argument is addressed to the alleged "failures" in the delinquent tax sale proceeding. In my view, however, the threshold issue in this case is whether or not there was a forfeiture of the mineral interest for nonentry in 1943, or later years prior to 1961, as opposed to a delinquency in 1961 for nonpayment of taxes. Upon this issue counsel for the plaintiff, after noting the distinction between forfeited land and delinquent land, cites the statutory requirement of Code, 11A-4-13, that all

such suits be initiated by a bill containing a list of the lands included, setting forth the amount due, "indicating whether the land is forfeited, delinquent, * * *." Notwithstanding said statutory requirement, I am of opinion that regardless of whether the property in question was forfeited for nonentry, or delinquent for nonpayment of taxes, the provisions of Code, 11A-4-33 would convey whatever interest was held by the State. *Code, 11A-4-33* provides as follows:

> "Whenever, under the provisions of this article, a purchaser, his heirs or assigns, shall have obtained a deed for any real estate from the deputy commissioner, he or they shall thereby acquire all such right, title and interest in and to the real estate as was, at the time of the execution and delivery of the deed, vested in or held by the State or by any person who was entitled to redeem, unless such person is one who, being required by law to have his interest separately assessed and taxed, has done so and has paid all the taxes due thereon, or unless the rights of such person are expressly saved by the provisions of sections twenty-seven or thirty-four of this article. The deed shall be conclusive evidence of the acquisition of such title. The title so acquired shall relate back to the date of the sale.
>
> " * * * * * * * "

Consequently, I am of opinion that perforce Code, 11A-4-33, the defendant, W. P. Dodd, acquired, by the Commissioner's deed dated June 1, 1966, all the State's right, title and interest in said property at the time of the conveyance. I therefore find no merit in the proposition or contention relating to forfeiture for nonentry, as opposed to delinquency for nonpayment of the taxes.

Closely related to the proposition that the mineral interest in question was forfeited for nonentry in 1943, or later years prior to 1961, as opposed to its becoming delinquent in 1961, is plaintiff's contention concerning the validity of the tax sale "because of problems of 'identity'." Notwithstanding the apparent curative effect of Code, 11A-4-39(a) in such a situation, counsel for the plaintiff contends that since said

section was enacted in 1953, without any indication that it was to be retroactive in effect, it would have no bearing on the outcome of this case. In either event, whether or not retroactive, in view of the fact that the plaintiff continued to pay the taxes on the mineral interest in question from the time of the conveyance in 1937, through the year 1960, there was no forfeiture for nonentry of the property in question prior to the effective date of said statute.

Plaintiff also asserts that Code, 11A-4-39(a) is unconstitutional in that the language of said statute allows such latitude in the taking of a person's property that it would not even be necessary for the property to be described in any recognizable fashion, nor be entered in the proper taxing district. While I have very carefully considered plaintiff's agrument in this regard, as well as the authorities cited, I do not believe that the statute is, in this respect, unconstitutional.

Before proceeding to consider the remaining substantive issues raised by the plaintiff in this proceeding, I should, perhaps, comment upon the assertion made by the defendant, Columbia Gas Transmission Corporation, to the effect that the plaintiff must recover, if at all, on the strength of her claimed title, and not on the basis of any alleged weakness of the defendants' title. While I fully agree with such assertion, I fail to see how this issue will materially affect the outcome of this proceeding. The plaintiff is simply attempting to establish her superior right by showing the invalidity of the tax deed in question; otherwise, upon these pleadings, I discern no dispute between the parties as to plaintiff's claim of title.

As noted earlier in this opinion, several contentions contesting the validity of the Commissioner's "purported" conveyance are asserted by the plaintiff. One such contention is that, perforce Code, 11-4-9, only the undivided interest proceeded against passed to the purchaser, so that, consequently, the defendant Dodd acquired only "1/8 Acre" oil and gas interest by said tax deed. Without belaboring this opinion with a lengthy discussion as to what I perceive to be the meaning and purpose of said statute, I will say that, in my view, said statute pertains only to assessments of real estate interests which are held jointly or in common, and not to a particular interest which may be erroneously described. Therefore, I do not believe that said statutory provision, restricting passage of title to only the interest proceeded against, has any application in this case. Moreover, in view of the fact that the correct interest could have been ascertained by reference to the former conveyance, the purchaser, in my opinion, acquired all the right, title and interest in and to the real estate as was, at that time, vested or held by the State.

Plaintiff also cites and relies on Code, 11A-4-11, in support of the relief sought by her. Said section imposes a duty upon the Deputy Commissioner, in a suit for the sale of any forfeited or delinquent land, to make parties defendant all unknown claimants of any interest in such lands, and requires that the Commissioner also name as a party defendant all other persons who, according to his knowledge however acquired, have or claim any interest in any of the land included in the suit. The following section, however, *Code, 11A-4-12,* appears to cure any such failure in the requirement of the preceding section, if notice by publication is given, by providing, *inter alia:*

> "* * * in view of the further fact that all parties known and unknown who may claim an interest in any of the lands included in the suit are given notice thereof by the order of publication provided for above; therefore, the legislature deems it both expedient and necessary to provide that failure to name any such person as a defendant shall in no wise affect the validity of any of the proceedings in the suit for the sale of the State's title to such land; * * *."

Therefore, subject to my consideration of the issue at to the constitutionality of said Section 12, I find no merit in the contention regarding the Commissioner's failure to name the plaintiff in the tax proceeding.

It is also asserted by the plaintiff that insufficient notice as to the time of sale was given by the Deputy Commissioner, in violation of Code, 11A-4-33, and in disregard of the order of this Court dated April 11, 1966. While, admittedly, notice of the sale was not published fifteen (15) days prior to the date of sale, I do not believe that such failure would render said proceeding void. As noted by counsel for defendant Dodd, the purpose of the notice provision, as stated in the statute, is to "encourage attendance at the sale." Aside from the curative provisions of Code, 11A-4-33, I do not believe that such failure on the part of the Deputy Commissioner was shown to have prejudiced the rights of the plaintiff in this case. Consequently, I do not believe such failure affected the validity of the title conveyed in this case.

Plaintiff also contends that the property in question was so incorrectly described in the Deputy Commissioner's complaint as to render the proceedings against the subject property void. In this regard, it is argued that the Deputy Commissioner's complaint should have referred to Cecle G. Pearson's source of title instead of H. C. Pearson, Jr.'s source of title. In my opinion, the reference to the former owner's source of title did not affect the validity of the tax sale. Plaintiff made payments on the taxes assessed in the name of H. C. Pearson, Jr., and there is nothing in this record to show that she was in fact misled by such description. I, therefore, find no merit in this regard.

I again note that I have not attempted herein to respond to every assertion regarding the regularity and/or validity of the proceedings for the sale of the mineral interest in question. I have nevertheless carefully considered all of said contentions, and am of opinion that all of said irregularities and/or "failures" come within the meaning of *Code, 11A-4-33,* which provides in part as follows:

> "Except as otherwise provided in this section, no irregularity, error or mistake in respect to any step in the procedure leading up to and including confirmation of the sale or delivery of the deed shall invalidate the title thereby acquired."

Accordingly, said irregularities or "failures" do not, in my opinion, constitute sufficient reason for declaring this particular sale void.

Notwithstanding the aforementioned curative effects of Code, 11A-4-12, plaintiff contends that said section is invalid because the object of that section is not expressed in the title to the Act, as required by the West Virginia Constitution, Article IV, § 30, which provides as follows:

> "No act hereafter passed, shall embrace more than one object, and that shall be expressed in the title. But if any object shall be embraced in an act which is not so expressed, the act shall be void only as to so much thereof, as shall not be so expressed, and no law shall be revived, or amended, by reference to its title only; but the law revived, or the section amended, shall be inserted at large, in the new act. And no act of the legislature, except such as may be passed at the first session under this Constitution, shall take effect until the expiration of ninety days after its passage, unless the legislature shall by a vote of two-thirds of the members elected to each house, taken by yeas and nays, otherwise direct."

Counsel for the plaintiff acknowledges a discussion of this question in the opinion in *State v. Blevins,* 131 W. Va. 350, at pages 355 and 356, as follows:

> "The questions raised by the demurrer are grounded entirely on the statute, the title of which reads as follows: 'AN ACT to amend and reenact section eight, article three, and all of article four, chapter *eleven-a* of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to the collection and enforcement of property taxes, including the redemption of forfeited and delinquent lands and the sale of forfeited, delinquent, escheated and waste and unappropriated lands for the benefit of the school fund.' (Italics ours). It will be noted that the above quoted title refers to Chapter 11A of the Code of 1931. An ex-

amination of the official Code of 1931, discloses that no chapter therein contained is designated as 11A. But Chapter 117, Acts of the Legislature, 1941, added a new chapter to the Code of 1931 to be numbered '11-A'. The provisions of Chapter 117, *idem,* eliminate the apparent inaccuracy in the title of the statute here considered, and we consider that the title sufficiently identifies the applicable statutes amended and reenacted thereby."

Counsel points out, however, and correctly so, that the quoted discussion was not "supported" in the syllabus. Nevertheless, in my opinion, said discussion correctly indicates the constitutionality of said Act. In a recent case on this general subject—City of Huntington v. Chesapeake & Potomac Telephone Company (W. Va., 1970), 177 S. E. 2d 591—the Court collates a number of pertainent syllabi from former decisions, as follows:

"* * * * * *.

"3. The 'object' of an act of the legislature, as that word is used in section 30, Article VI, Constitution, means the matter or thing forming the groundwork of the act. The act therefore may contain many parts germane to the title, but they must be such that when traced back will lead the mind to the object expressed in the title as their generic head.' Point 1 Syllabus, Moats v. Cook, 113 W. Va. 151 [167 S. E. 137].

"4. 'When the principal object of an act of the legislature is expressed in the title, and the act embraces, along with such principal object other incidental or auxiliary objects germane to the principal object, the act is not repugnant to section 30, art. 6, of the constitution, and is valid as to such principal and auxiliary or incidental object.' Point 10 Syllabus, State v. Mines, 38 W. Va. 125 [18 S. E. 570].

"5. 'If the title of an act is broad enough to give a fair and reasonable index to all the purposes of the act, it is not necessary to descend to particulars in the

title.' Point 1 Syllabus, State ex rel. Hallanan v. Thompson, 80 W. Va. 698 [93 S. E. 810].

"* * * * * * * *"

The decision in *State ex rel. Myers v. Wood* (W. Va., 1970), 175 S. E. 2nd 637, cited by counsel for the plaintiff, is not, in my opinion, in point or even persuasive in considering the instant case inasmuch as the decision in the *Myers* case involved a criminal offense embodied in an act which, by its title, purported to relate only to the administration and financial affairs of the State and to the Department of Finance and Administration. I, therefore, am of opinion that there is no merit in the contention that Code, 11A-4-12 is invalid for failure to state the object of the act in the title.

The due process objection in this case involves the sufficiency of notice of the sale to the plaintiff. It is argued that the inclusion of the plaintiff as an "unknown party" does not constitutionally satisfy the notice requirement. I have carefully considered all the arguments in support of this contention, as well as the authorities cited. While plaintiff's argument is persuasive, I am, nevertheless, of opinion that my decision is controlled by the second syllabus in the case of *State v. Simmons,* 135 W. Va. 196, as follows:

"In a suit to sell forfeited and delinquent lands for the benefit of the school fund, instituted under the provisions of Chapter 160, Acts of the Legislature, 1947, Regular Session, persons holding record liens against, having or claiming an interest in, or in possession of, such lands, whether residents or nonresidents of this State, may be proceeded against as unknown defendants by an order of publication; and such procedure is not violative of the due process or other provisions of the Constitution of the United States or of the Constitution of West Virginia."

As an alternative proposition, plaintiff contends that she is entitled to one-eighth of all the oil and gas produced, citing Code, 11-4-9, which, as noted above, provides that only the interest or undivided interest proceeded against

shall pass to the purchaser. In my opinion, however, for the reasons stated above, said provision is not applicable to the case at bar wherein the interest proceeded against was a one-fourth interest, despite the fact that it was erroneously designated as one-eighth. The applicable provision, in my opinion—Code, 11A-4-33—provides that the purchaser from the Deputy Commissioner " * * * shall thereby acquire all such right, title and interest in and to the real estate as was, at the time of the execution and delivery of the deed, vested in or held by the State or by any person who was entitled to redeem * * *."

I have also carefully considered the plaintiff's argument pertaining to "unjust enrichment". I do not believe, however, that the evidence stipulated in this case warrants any relief on this ground. The stipulation reveals that the Commissioner's deed conveying the real estate to defendant Dodd was dated June 1, 1966; that the lease agreement referred to in paragraph "M" of the stipulation was ratified by defendant Dodd and his wife on February 17, 1967; that various other agreements concerning the mineral interest were entered into prior to March 20, 1968, the commencement date for the well; that the drilling thereof was completed on March 26, 1968; and that this action was not instituted until July 9, 1971. Under these circumstances, I fail to see the plaintiff's equity in this regard.

Upon all of the foregoing, I am of opinion and find that the plaintiff, Cecle G. Pearson, owns no part of the oil and gas interest asserted in the complaint filed in this action, and that the tax deed described in the complaint filed in this action, and the other instruments based thereon, should not be set aside as a cloud upon the title of the plaintiff in and to said oil and gas interest. Accordingly, the special defenses asserted by the defendants in this case are moot, and need not be decided by me. I would note, however, that the defense of *res judicata,* since it would precede consideration of the plaintiff's contentions, did not, in my opinion, preclude consideration of the plaintiff's contentions in this case, in view of the fact that such issues were apparently not before me in the former proceeding.

A proper order in conformity herewith should be tendered for entry promptly, and should make this letter memorandum of opinion a part of the record. A copy for that purpose may be obtained from my secretary upon presentation of the order.

Very truly yours,

s/Frank L. Taylor
Frank L. Taylor, Judge

WEST VIRGINIA STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

§ 11A—4—12. Service of process by publication; failure to name person as defendant; failure to obtain personal service in prior suits.

Upon the institution of a suit as provided in section ten [§ 11A-4-10] of this article, the clerk of the circuit court shall enter an order of publication, without the filing of any affidavit by the deputy commissioner as required in other cases. Such order of publication shall give the style of the suit, as, State of West Virginia v. A.B. et al.; shall state that the object of the suit is to obtain a decree of the circuit court ordering the sale for the benefit of the school fund of all lands included in the suit; shall list all such lands, setting forth as to each item its local description, the former owner in whose name the land was forfeited, or was returned delinquent and sold, or escheated, as the case may be, and the names of such other defendants as may be interested therein; and shall require all the named defendants, and all unknown parties who are or may be interested in any of the lands included in the suit to appear within one month after the date of the first publication thereof and do what is necessary to protect their interests.

The order shall be published as a Class III-0 legal advertisement in compliance with the provisions of article three [§ 59-3-1- et seq.], chapter fifty-nine of this Code, and the publication area for such publication shall be the county. The cost of such publication shall be charged ratably to each item listed in the suit, and shall be taxed to the State as part of its costs in the suit and paid as hereinafter provided.

In view of the fact that the State has absolute title to all forfeited land, to all land sold to the State for nonpayment of taxes and become irredeemable, to all escheated land, and to all waste and unappropriated land, and must under

the Constitution have such an absolute title before the land may be sold for the benefit of the school fund; and in view of the fact that the former owner of any such land, or any person claiming under him has no further interest therein nor rights in respect thereto except such privilege of redemption as may be extended to him by the legislature as an act of grace; and in view of the further fact that all parties known and unknown who may claim an interest in any of the lands included in the suit are given notice thereof by the order of publication provided for above; therefore, the legislature deems it both expedient and necessary to provide that failure to name any such person as a defendant shall in nowise affect the validity of any of the proceedings in the suit for the sale of the State's title to such land; and in view of the fact that the supreme court of appeals in a decision just rendered has held that there is no constitutional requirement that the former owner or any other interested person be personally served with process in a suit for the sale for the benefit of the school fund of lands that are and must be the absolute property of the State; and in view of the further fact that in its last previous enactment of this section the legislature had no intention of requiring that personal service of process on named defendants in such a suit should be a mandatory condition precedent to the validity of any step or proceeding in such suit, but on the contrary expressly stated that failure to serve the summons on any named defendant should in nowise affect the validity thereof; now therefore, the legislature also deems it both expedient and necessary to provide that the failure to obtain such personal service on any named defendant in any suit instituted under the provisions of this article prior to the effective date hereof [March 11, 1949] shall in no way affect the validity of any step or proceeding in any such suit or the validity of the title acquired by the purchaser of land sold under any decree made or to be made in any such suit. (1947, c. 160; 1949, c. 134; 1967, c. 105.)

§ 11A—3—8. Redemption from purchase by or forfeiture to State; lands made irredeemable.

The former owner of any real estate so purchased by the State, or any other person who was entitled to pay the taxes thereon, may redeem such real estate from the auditor at any time within eighteen months after the date of such purchase. Thereafter such real estate shall be irredeemable and subject to transfer or sale under the provisions of sections 3 and 4, article XIII of the Constitution.

The former owner of any real estate forfeited to the State for nonentry, or any other person who was entitled to pay the taxes thereon, may redeem such real estate from the auditor at any time prior to its certification by the auditor for sale for the benefit of the school fund as provided in article four [§ 11A-4-1 et seq.] of this chapter, but such redemption shall be subject to any prior transfer under the provisions of section 3, article XIII of the Constitution.

In order to redeem the person seeking redemption must pay to the auditor such of the following amounts as may be due: (1) The taxes, interest and charges for which the real estate was sold, with interest at the rate of twelve percent per annum from the date of sale. (2) All taxes assessed thereon for the year in which the sale occurred, with interest at the rate of twelve percent per annum from the date on which they became delinquent, except when such taxes are currently due and payable to the sheriff. (3) All taxes except those for the current year which would have been assessed thereon since the sale had the sale not occurred, or which, in the case of land forfeited for nonentry, would have been assessed thereon had the land been properly entered, with interest at the rate of twelve percent per annum from the date on which they would have become delinquent. (4) The fee provided by the following section [§ 11A-3-9] for the issuance by the auditor of the certificate of redemption.

In computing the amount due under number three on real estate purchased by the State, the auditor shall use as the basis for computation the classification and valuation placed thereon by the assessor for each year since the sale. If such valuation and classification have not been made, he shall use the last valuation and classification appearing on the property books. In computing the amount due under number three on real estate forfeited for nonentry, the auditor shall use as the basis for computation such classification and valuation as may, at the request of the auditor or the person redeeming, be certified to the auditor by the assessor as the classification and valuation which in his opinion would be proper for each year of nonentry.

In the case of partial redemption, he must pay only the proportion of such taxes as are chargeable to the part or interest redeemed, but must pay all of the other charges and the fee required for redemption of the whole. However, redemption of an undivided interest included in a group assessment or of part of a tract or lot the whole of which was assessed in the name of a person other than the owner shall not be permitted until the applicable provisions of section nine [§ 11A-1-9] or of section ten [§ 11A-1-10], article one of this chapter, have been complied with, except that instead of presenting the assessor's certificate to the sheriff as therein required, the person redeeming shall present it to the auditor, who, after making the necessary changes in the land book, and in the record of delinquent lands kept in his office, shall compute the taxes due on the part of interest redeemed.

Art. 13, § 4. Waste and Unappropriated Lands

§ 4. All lands in this State, waste and unappropriated, or heretofore or hereafter for any cause forfeited, or treated as forfeited, or excheated to the state of Virginia, or this State, or purchased by either and become irredeemable, not redeemed, released, transferred or otherwise disposed of,

the title whereto shall remain in this State till such sale as is hereinafter mentioned be made, shall by proceedings in the circuit court of the county in which the lands, or a part thereof, are situated, be sold to the highest bidder.

UNITED STATES CONSTITUTION AMENDMENT 14

ARTICLE XIV_

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

NO. 13257

CECLE G. PEARSON,
Appellant,

v.

(Circuit Court of Kanawha County CA No. 8310)

W. P. DODD, et al.,
and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Cecle G. Pearson, the Appellant named above, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Appeals of the State of West Virginia, entered in this proceeding on December 18, 1975, which affirmed the final order of the Circuit Court of Kanawha County, West Virginia, entered on June 21, 1972, which overruled Appellant's motion for a new trial, thus holding that the Appellant did not own any part of the oil and gas interest contended for in her action to quiet title against the Appellees.

This appeal is taken pursuant to 28 U.S.C. §1257(2), or, in the alternative, §1257(3).

This Notice supersedes Notice dated February 5, 1976.

Dated: February 26, 1976.

Philip G. Terrie
Attorney at Law
1009 Security Building
Charleston, West Virginia 25301

s/Philip G. Terrie
Counsel for Cecle G. Pearson,
Appellant

AFFIDAVIT OF SERVICE OF NOTICE OF APPEAL

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, TO-WIT:

I, PHILIP G. TERRIE, attorney for Cecle G. Pearson, Appellant herein, depose and say that on the 26th day of February, 1976, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States upon W. P. Dodd and Ernestine Dodd, his wife, Appellees herein, by delivering the same to William E. Hamb, counsel of record for said W. P. Dodd and Ernestine Dodd, at his office at 950 Kanawha Boulevard, East, Charleston, West Virginia 25301, and, further, that I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States upon Columbia Gas Transmission Corporation, Appellee herein, by delivering the same to William Roy Rice, counsel of record for said Columbia Gas Transmission Corporation, at his office at 1700 MacCorkle Avenue, S. E., Charleston, West Virginia 25304.

s/Philip G. Terrie

Subscribed and sworn to before me, Mary C. Matheny, at Charleston, West Virginia, this 26th day of February, 1976.

s/Mary C. Matheny
Notary Public in and for Kanawha
County, West Virginia

My commission expires September 24, 1978.

APPENDIX

IN THE
Supreme Court of the United States
October Term, 1975

No. 75-1318

CECLE G. PEARSON,

Appellant

—v.—

W. P. DODD; ERNESTINE DODD, his wife: and COLUMBIA GAS TRANSMISSION CORPORATION

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKETED MARCH 15, 1976,
PROBABLE JURISDICTION NOTED JUNE 21, 1976

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1318

CECLE G. PEARSON, *Appellant*

—v.—

W. P. DODD; ERNESTINE DODD, his wife: and COLUMBIA GAS TRANSMISSION CORPORATION

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

INDEX TO APPENDIX

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IN THE CIRCUIT COURT OF
KANAWHA COUNTY,
WEST VIRGINIA

Civil Action No. 8310

DOCKET ENTRIES

Date		PROCEEDINGS
1968		
Oct.	15	By Check; Sun. & 3 Copies: Complaint
	17	Return as to United Fuel Gas Co.
	17	Return as to W. P. Dodd and Ernestine Dodd
Nov.	6	Notice of bona fide defense with return
	15	Order; Stipulation
	16	Separate Answer of W. P. Dodd and Ernestine Dodd, his wife
Dec.	2	Answer and Counterclaim of United Fuel Gas Company
	21	Reply to Counterclaim of Defendant United Fuel Gas Company
1969		
Jan.	2	Interrogatories
	10	Order; Stipulation
March	3	Objections to Interrogatories propounded by plaintiff to defendant, United Fuel Gas Co.; and Notice with Certificate of Service: United Fuel Gas Company's Answers to Interrogatories, not objected to, propounded by plaintiff
July	3	Order; Memorandum of Opinion dated June 27, 1969
	16	United Fuel Gas Co.'s Answers to Interrogatories objected to, wherein objections were overruled

Date		PROCEEDINGS
1969		
Dec.	19	Discovery Depositions of Cecle G. Pearson; Discovery Depositions of Myron Maurice Miller and Joseph Calvin Crim
1971		
July	9	Order substituting Columbia Gas Transmission Corp. etc. as a party defendant in place of United Fuel Gas Co.; Order; Motion for substitution of party; Order filing stipulations and Exhibits; Stipulations and Exhibits
1971		
Nov.	5	By Check (Additional Clerk's fee to October 15, 1972)
1972		
June	19	Judgment Order; Letter of Memorandum of opinion dated April 17, 1972
	21	Order granting 90 days Stay of Execution;Motion of plaintiff with return
Sept.	8	Petition of Cecle G. Pearson, seeking appeal, writ of error and supersedeas to Supreme Court; By Check (Clerk's fee for indexing record to Supreme Court of Appeals)
Oct.	4	Order from Supreme Court grant writ of error and Supersedeas
	6	Designation of record; Bond
Nov.	16	By Check (Clerk's fee for making transcript of Supreme Court of Appeals)
1976		
Jan.	13	Order from Supreme Court of Appeals affirming Judgement of Circuit Ct. June 21, 1972

Date		PROCEEDINGS
1976		
Feb.	6	Notice of Appeal to the Supreme Court
	10	Order From Supreme Ct. of Appeals suspending the execution of judgment entered Dec. 19, 1975 in the Circuit Court for a period of 90 days
	26	Bond from Supreme Court of Appeals of WV
	27	Notice Of Appeal to the Supreme Court of the United States, Affidavit of Service of Notice of Appeal
March	10	Designation of Record

CLERK'S CERTIFICATE

Certified to be a true and correct copy of the original.

By /s/ Phyllis J. Rutledge
PHYLLIS J. RUTLEDGE
Clerk
Court Kanawha County, W. Va.

Opinion of the Supreme Court of Appeals of West Virginia, dated December 18, 1975. (See Appendix 1A Jurisdictional Statement.)

Judgment and Letter memorandum of opinion of the Circuit Court of Kanawha County, dated April 17, 1972. (See Appendix Page 26A Jurisdictional Statement.)

IN THE CIRCUIT COURT OF
KANAWHA COUNTY,
WEST VIRGINIA

Civil Action No. 8310

[Title Omitted]

[Filed October 15, 1968]

COMPLAINT

1. The plaintiff, Cecle G. Pearson, is the owner of one-fourth (1/4th) of all the oil and gas and gasoline, and oil and gas substances in and underlying all that certain tract or parcel of land situate, lying and being near the source of the waters of Martin's Branch, in Union District, Kanawha County, West Virginia, more particularly described as follows, to-wit:

BEGINNING in an old road at a small sycamore and corner to the lands of James D. Kelley, and running north 86° 30' E. 74 feet to a stone in said creek; thence S. 41° 30' E. 107 feet to a stone at the upper side of the road; N. 50° E. 112 feet to a stone in a drain; S. 62° 30' E. 360 feet to a poplar in a hollow, corner to the lands of Ezell in the original line; thence with old line N. 24 E. 1270 feet to a white oak snag on top of the ridge corner to James Craff's land and Ed Lane; thence with the Craff line N. 32° 30' W. 610 feet to a black oak in said Craff's line corner to a tract surveyed for William S. Pugh; thence with a new made line dividing land of Sarah A. Pugh and William S. Pugh, N. 73° 45' W. 531 feet to a dead top chestnut on hillside; thence N. 76° 45' W. 662 feet to a hickory near top of point S. 75° 15' W. 1105 feet to a bunch of hickories on top of a ridge in the original line about 12 feet from the gas line; thence along the ridge S. 31° 30' E. 517 feet to a poplar and oak now gone

and corner to lands of James Kelley S. 21° 30′ W. 21 feet to a stake in an old road and following said road S. 13° E. 255 feet to a white oak at the edge of said road; thence S. 55° 30′ E. 185 feet to a stake in the road S. 78° E. 180 feet to a stake in the road S. 59° 30′ E. 505 feet to a stake in said road S. 42° E. 378 feet to the place of Beginning, and containing Sixty-eight (68) acres, more or less; with such surface and surface rights, rights of way, rights and privileges necessary or convenient for prospecting, operating, drilling, extracting, mining, removing, storing, transporting and marketing said oil and gas, and gasoline and oil and gas substances.

2. The aforesaid mineral interest underlying the aforesaid parcel was conveyed to the plaintiff, Cecle G. Pearson, by H. C. Pearson, Jr., by deed dated February 20, 1937, and duly of record in the office of the Clerk of the County Court of Kanawha County, West Virginia, in Deed Book 436, at page 110.

3. By purported tax deed from William B. Maxwell, Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia, to one of the defendants, W. P. Dodd, which deed bears the date June 1, 1966, and which is duly of record in the aforesaid Clerk's office in Deed Book 1467, at page 378, the said William B. Maxwell, Deputy Commissioner, attempted to convey unto one of the defendants, W. P. Dodd, the mineral interest of the said H. C. Pearson, Jr. in land more particularly described as follows:

68 Acres, 1/8 Acre oil and gas interest, Waters Martins Branch, Union District, Kanawha County, West Virginia, being the same property conveyed to H. C. Pearson, Jr. by W. H. O'Dell and Minerva E. O'Dell, his wife, by deed dated February 8, 1937, and of record in the office of the Clerk of the County Court of Kanawha County, West Virginia, in Deed Book 428, at page 53, reference to which deed is here made for a more particular description of said property.

4. The plaintiff is informed and believes that the said William B. Maxwell, Deputy Commissioner of Forfeited and Delinquent Lands, purported to sell the aforesaid decribed lot by virtue of the fact that the interest of H. C. Pearson, Jr. was purportedly sold to the State of West Virginia in the year 1962 for the non-payment of property taxes thereon for the year 1961.

5. The plaintiff is informed that the said W. P. Dodd, one of the defendants, is contending that the purported deed from William B. Maxwell, Deputy Commissioner aforesaid, conveyed to the said defendant one-fourth (1/4th) of all the oil and gas and gasoline, and oil and gas substances owned by the plaintiff and described in the first paragraph of this complaint, which said claims of the said defendant are annoying and vexatious to the title of the plaintiff and thereby constitute a cloud upon the clear and perfect title of the plaintiff to the interest described in paragraph one (1.) of this complaint.

6. The plaintiff is informed and believes, and, therefore, alleges, that the purported delinquent tax sale in the name of H. C. Pearson, Jr., by the Sheriff of Kanawha County, West Virginia, in 1962 was a nullity. That the purported deed and the purported suit by William B. Maxwell, Deputy Commissioner, was a nullity and that the deed from William B. Maxwell, Deputy Commissioner, to the defendant, W. P. Dodd, is a nullity and includes no part of the aforesaid land owned by the plaintiff.

7. The plaintiff is informed and believes and, therefore, alleges that the defendant, United Fuel Gas Company, relying on the purported sale referred to in paragraph three (3.) entered into a lease ratification agreement with the defendants, W. P. Dodd and Ernestine Dodd, his wife, which is dated February 17, 1967, and recorded in the aforesaid Clerk's office in Lease Book 164, at page 314, which lease ratification agreement is based upon an oil and gas lease granted to the defendant, United Fuel Gas Company, by Marvin Null and Sarah Ann Null, his wife,

and Maxine H. O'Dell, Guardian, et al., dated December 27, 1957, describing the sixty-eight (68) acres described more fully in paragraph one (1.) of this complaint, and recorded in the aforesaid Kanawha County Clerk's office in Lease Book 145, at page 67. The said lease and ratification agreement were amended to provide for pooling for deep gas production by an agreement by and between Sarah Ann Null and Marvin Null, her husband, W. P. Dodd and Ernestine Dodd, his wife, and the United Fuel Gas Company, by agreement dated November 13, 1967, and recorded in the aforesaid Clerk's office in Lease Book 169, at page 727.

8. The plaintiff is informed and believes, and, therefore alleges, that the defendant, United Fuel Gas Company, in further reliance on the purported sale referred to in paragraph three (3.) caused to be executed a "Declaration-Notice of Unitization", which purported to unitize all the oil and gas interest underlying the sixty-eight (68) acre tract described in paragraph one (1.) of the complaint with the remainder of the oil and gas interest underlying the sixty-eight (68) acre tract and additional oil and gas interests in the immediate area totalling two hundred seventy (270) acres, and that said unitization agreement is dated January 10, 1968, and recorded in the office of the Clerk of the County Court of Kanawha County, West Virginia, in Lease Book 170, at page 225.

9. The plaintiff is informed and believes, and, therefore, alleges, that the United Fuel Gas Company did obtain a permit from the Oil and Gas Division of the Department of Mines, State of West Virginia, dated February 19, 1968, bearing File No. KAN-2232, which well is located on the land and interest described in paragraph one (1.) of this Complaint, and which was drilled to completion in what is generally referred to as the Newburg Sand of Kanawha County, with a reported initial open flow capacity of production of natural gas after treatment, of one hundred million cubic feet of natural gas per day (100,000 mcf/day), according to a well completion record filed July 30, 1968,

with the aforesaid Oil and Gas Division of the West Virginia Department of Mines.

10. The plaintiff is informed and believes, and, therefore, alleges, that the United Fuel Gas Company, acting for itself and its lessors did, with full knowledge and notice of the rights and interests of the plaintiff in the sixty-eight (68) acres of oil and gas, and without the consent of the plaintiff, Cecle G. Pearson, proceed wilfully and intentionally under terms of the aforesaid agreement, void as to the plaintiff, to drill, equip and complete the aforesaid well without offering to the plaintiff a full one-fourth (1/4th) interest in the well as a non-consenting co-tenant, thereby damaging the interest of the plaintiff.

11. The plaintiff is informed and believes, and, therefore alleges, the gas well described in paragraph nine (9.) of this complaint has been, until the present date, in the continuous production of natural gas and certain other petroleum derivatives.

12. The plaintiff is informed and believes, and, therefore alleges, that the defendant, United Fuel Gas Company, has been improperly receiving payment from third parties for the aforesaid gas production and has improperly been making payments to the defendants, W. P. Dodd and Ernestine Dodd, his wife, under terms of the purported lease ratification agreement by W. P. Dodd and Ernestine Dodd, as well as making other unauthorized payments of money to other third parties from the sale of the gas and other petroleum derivatives underlying the parcel described in paragraph one (1.) of this complaint.

WHEREFORE, Plaintiff prays:

1. That the purported deed of conveyance from the said William B. Maxwell, Deputy Commissioner, to the aforesaid defendant, W. P. Dodd, bearing date June 1, 1966, may be set aside and declared void as against this plaintiff, as a cloud upon the title of this plaintiff.

2. That the purported oil and gas lease, purported ratification, and purported pooling agreement referred to

in paragraph seven (7.) of this Complaint may be set aside and declared void as against this plaintiff, as a cloud upon the title of this plaintiff.

3. That the purported "Declaration-Notice of Unitization" Agreement by United Fuel Gas Company, et als., may be set aside and declared void as against this plaintiff, as a cloud upon the title of this plaintiff.

4. That the full one-fourth (1/4th) interest of the plaintiff as a non-consenting co-tenant is one-fourth (1/4th) of the total amount actually received by the defendant, United Fuel Gas Company, for all the material severed from the well at the point of its ultimate conversion by the defendant, United Fuel Gas Company, without diminishing this amount by the plaintiff's proportionate share of the cost of production, including taxes, or allowing for the cost of improvements.

5. That an accounting be made to date for the plaintiff's full one-fourth (1/4th) interest as a non-consenting co-tenant with interest on this amount from the time said amount (s) was created.

6. That an accounting be made of the gross production of the well for all production to date and that a continuing accounting be made, which will allow for the plaintiff's full one-fourth (1/4th) interest.

7. That the interest of the plaintiff, Cecle G. Pearson, not be diminished by any payments, previously made, now being made, or which may in the future be made to W. P. Dodd, Ernestine Dodd, or any other third parties, by the defendant, United Fuel Gas Company.

8. And grant unto plaintiff such other, further and general relief as the Court may deem proper.

/s/ Rex Burford
REX BURFORD
Attorney for Plaintiff
Suite 57-58 Capital City Bldg.
Charleston, West Virginia

[Verification Omitted]

IN THE CIRCUIT COURT OF
KANAWHA COUNTY,
WEST VIRGINIA

Civil Action No. 8310

[Title Omitted]

[Filed December 2, 1968]

ANSWER AND COUNTERCLAIM
OF THE DEFENDANT,
UNITED FUEL GAS COMPANY

FIRST DEFENSE

For the sake of brevity, the following terminology as used in this and all other Defenses in this answer, regardless of capitalization, shall have the following meanings and references:

"Deputy Commissioner" shall mean W. B. Maxwell, Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia.

"Subject Land" shall mean the tract or parcel of land described in paragraphs Nos. 1, 2 and 3 of the complaint.

"Interest claimed by plaintiff" shall mean a one-fourth of all the oil and gas and gasoline, and oil and gas substances in and underlying the tract or parcel of land described in paragraphs Nos. 1, 2 and 3 of the complaint claimed by the plaintiff, Cecle G. Pearson.

The complaint fails to state a claim against defendant upon which relief can be granted for the following reasons:

(1) The averments and admissions in the complaint show that plaintiff has no basis in fact for the relief sought in this action;

(2) There is no allegation of fact which, if true, would invalidate the deed described in paragraph 3 of the complaint from the Deputy Commissioner to W. P. Dodd, defendant herein.

(3) Plaintiff admits in paragraph 4 of the complaint that the interest claimed by plaintiff was sold to the State of West Virginia in the year 1962 for the non-payment of property taxes for the year 1961;

(4) The plaintiff in Paragraph 3 of the complaint admits that the deed from the Deputy Commissioner to W. P. Dodd, one of defendants, was executed for the purpose of conveying the interest claimed by plaintiff to W. P. Dodd.

(5) The allegations in paragraph 6 of the complaint that the aforesaid deed to W. P. Dodd, the "purported suit" by the Deputy Commissioner and the aforesaid tax sale are all nullities are conclusions not supported by any allegation of fact in the complaint;

(6) In paragraphs 1, 2 and 3 of her prayer, plaintiff asks that the aforesaid deed to W. P. Dodd and certain instruments to and by this defendant be set aside and declared void which is a claim for equitable relief. In paragraph 4 of the prayer, the complaint shows on its face that plaintiff seeks equitable relief while refusing and being unwilling to do equity.

SECOND DEFENSE

Each of the first twelve numbered paragraphs in this Second Defense will correspond to the same numbered paragraph in the complaint, and except as otherwise shown by the context, the averments and denials in each of said first twelve paragraphs of this Defense will apply to the averments and denials in the correspondingly numbered paragraph of the complaint.

1. This defendant denies that Cecle G. Pearson, the plaintiff, is the owner of one-fourth (1/4), or any other fraction, percentage or proportion, or the whole, of all

the oil and gas and gasoline, and oil and gas substances, or any of them, in and underlying the subject land.

2. This defendant admits that there is of record in the Office of the Clerk of the County Court of Kanawha County, West Virginia, in Deed Book 436, at page 110, dated February 20, 1937, an instrument which purports to be a deed from H. C. Pearson, Jr., to Cecle G. Pearson and which purports to convey a mineral interest underlying the subject land, but this defendant has no knowledge or information sufficient to form a belief regarding the validity of said deed or the efficacy thereof. This defendant is advised and believes that the plaintiff bases all her claims in this action on said alleged deed.

3. This defendant denies that the deed from the Deputy Commissioner to W. P. Dodd described in paragraph 3 of the complaint was an attempt to convey to said W. P. Dodd the mineral interest formerly owned by H. C. Pearson, Jr., in the subject land as described in paragraphs 1, 2 and 3 of the complaint, but to the contrary, this defendant avers that said deed was a valid deed from the Deputy Commissioner to said W. P. Dodd and actually and validly conveyed to said W. P. Dodd the mineral interest formerly claimed by H. C. Pearson, Jr., in the subject land, together with the interest claimed by plaintiff.

4. Defendant admits that the Deputy Commissioner sold the subject land; admits that such sale included all interest of H. C. Pearson, Jr., and the interest claimed by plaintiff and that such sale included all the title to the subject land and interests therein acquired by the State of West Virginia through the sale to it in the year 1962 for non-payment of property taxes thereon for the year 1961. This defendant avers that such sale, and the deed executed pursuant thereto, included all right, title and interest of the State of West Virginia, however acquired, in the subject land.

5. This defendant denies that the plaintiff owns any interest in subject land, denies that the claims of the

defendant, W. P. Dodd, are annoying or vexatious to the plaintiff, denies that plaintiff has any title in subject land and denies that the claims of the defendant, W. P. Dodd, constitute a cloud on the alleged title of the plaintiff, for the reason that plaintiff has no title to subject land. Except for those herein expressly denied, this defendant admits the allegations in paragraph 5 of the complaint.

6. This defendant denies the allegations contained in paragraph 6 of the complaint.

7. This defendant admits the allegations contained in paragraph 7 of the complaint.

8. This defendant denies that the sale referred to in paragraph 3 of the complaint was a "purported sale" as alleged in paragraph 8 of the complaint, but to the contrary says that said sale was a legal and valid sale, and this defendant avers and admits that in reliance on said sale it caused to be executed a "Declaration-Notice of Unitization", which not only purported to, but actually did, unitize all the oil and gas interest underlying the subject land with the remainder of the oil and gas interest underlying the subject land and additional oil and gas interests in the immediate area totaling two hundred seventy (270) acres, and that said unitization agreement is dated January 10, 1968, and recorded in the Office of the Clerk of the County Court of Kanawha County, West Virginia, in Lease Book 170, at page 225.

9. This defendant denies that its well is located on land or any interest therein of the plaintiff. Except for those herein expressly denied, this defendant admits the allegations contained in paragraph 9 of the complaint.

10. This defendant admits that United Fuel Gas Company, acting for itself and its Lessors did, without the consent of the plaintiff Cecle G. Pearson, proceed under the terms of its agreements, more particularly described in paragraphs 7 and 8 of the complaint, to drill, equip and complete its said well, as described in paragraph 10 of the complaint, without offering to the plaintiff a full one-fourth (1/4)

interest, or any other interest, in the well. Except for those herein expressly admitted, this defendant denies the allegations contained in paragraph 10 of the complaint.

11. This defendant denies the allegations of parapraph 11 of the complaint.

12. This defendant denies the allegations contained in paragraph 12 of the complaint.

13. This defendant denies that plaintiff is entitled to any of the relief sought in the prayer of said complaint, and defendant says that this action should be dismissed, and this defendant should have all of its costs in this behalf expended.

14. This defendant denies each and every allegation contained in the complaint not expressly admitted in this answer.

THIRD DEFENSE

1. This defendant repeats all denials and averments made in the Second Defense of this Answer as a part of this Third Defense.

2. The matters and issues in this action were finally adjudicated and settled by orders, judgments and decrees, all of which are now final, in the Circuit Court of Kanawha County, West Virginia, entered in Civil Action No. 6152 styled *State of West Virginia by W. B. Maxwell, Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia, Plaintiff, v. L. (Lemuel) A. Whittington, et al., Defendants.*

3. This defendant says that the aforesaid action was instituted pursuant to the provisions and requirements of West Virginia Code, Chapter 11A, Article 4, *et seq.*, upon certifications from the Auditor of the State of West Virginia to the Deputy Commissioner, which certifications included the interest claimed by plaintiff, designated by the Auditor and in the pleadings in said Civil Action as Certification No. 9504.

4. This defendant says that H. C. Pearson, Jr., referred to in paragraph 2 of the complaint in Civil Action No. 8310, and predecessor in title to Cecle G. Pearson, plaintiff herein, and Cecle G. Pearson, as an unknown party and claimant, were proceeded against by publications duly made pursuant to an order of publication duly made in said action. By order entered in Civil Action No. 6152 on April 11, 1966, the title to the land and interest described as Certification No. 9504 and the interest of H. C. Pearson, Jr., and of the plaintiff Cecle G. Pearson was adjudged, ordered and decreed to be then vested in the State of West Virginia and subject to sale for the benefit of the school fund. The sale so ordered was duly held by the Deputy Commissioner and said Certification No. 9504 was there purchased by the defendant, W. P. Dodd. Such sale was duly reported to this Court by the Deputy Commissioner by his report dated May 25, 1966. By order of this Court in Civil Action No. 6152 duly entered on May 27, 1966, the Report of the Deputy Commissioner was ordered and adjudged approved, ratified and confirmed, and the sale of Certification No. 9504 to the defendant, W. P. Dodd, was thereby approved, ratified and confirmed, and the Deputy Commissioner was ordered to make, execute, acknowledge, record and deliver to W. P. Dodd a deed for Certification No. 9504. The Deputy Commissioner made, executed, acknowledged, recorded and delivered to W. P. Dodd such deed which is the deed referred to in paragraph 3 of the complaint by Cecle G. Pearson.

5. This defendant avers that the issue as to the validity of the interest claimed by plaintiff was determined in said Civil Action No. 6152 and that the judgments, orders and decrees entered in such action have determined that the plaintiff does not own the interest claimed by her. This defendant avers that the aforesaid judgments, orders and decrees are *res judicata* and bar the claimed right of plaintiff to maintain this action and bar all claims averred and relief sought in the complaint filed herein.

Fourth Defense

1. This defendant repeats all denials and averments made in the Second Defense of this Answer as a part of this Fourth Defense.

2. On March 20, 1968, with the knowledge of plaintiff, and in reliance on plaintiff's failure to object thereto or take other restraining action, this defendant entered on subject land described in paragraph 1 of the complaint, and in the exercise of good faith and due diligence, on March 26, 1968, defendant completed a producing gas well on subject land at a cost of $104,500.87.

3. Plaintiff by such conduct is estopped to deny the validity of this defendant's (i) lease ratification agreement with W. P. Dodd and Ernestine Dodd, his wife, dated February 17, 1967, and duly of record in the Office of the Clerk of the County Court of Kanawha County, West Virginia, in Lease Book 164 page 314, (ii) amended lease agreement between Sarah Ann Null and Marvin Null, her husband, W. P. Dodd and Ernestine Dodd, his wife, and this defendant, dated November 13, 1967, and duly of record in said Clerk's Office in Lease Book 169 page 727, which said lease ratification agreement and amended lease agreement are described in paragraph 7 of the complaint, and (iii) Declaration - Notice of Unitization by this defendant dated January 10, 1968, duly of record in said Clerk's Offiee in Lease Book 170 page 225, described in paragraph 8 of the complaint.

Fifth Defense

1. This defendant repeats all denials and averments made in the Second Defense of this Answer as a part of this Fifth Defense.

2. On or before February 10, 1967, plaintiff had actual knowledge of the deed from the Deputy Commissioner to W. P. Dodd, referred to in paragraph 3 of the complaint, conveying to W. P. Dodd the interest claimed by plaintiff. On or before November 21, 1967, plaintiff had actual

knowledge of this defendant's lease ratification agreement with W. P. Dodd and Ernestine Dodd, his wife, dated February 17, 1967, and duly of record in said Clerk's Office in Lease Book 164 page 314 and amended lease agreement between Sarah Ann Null and Marvin Null, her husband, and W. P. Dodd and Ernestine Dodd, his wife, dated November 13, 1967, duly of record in said Clerk's Office in Lease Book 169 page 727 referred to in paragraph 7 of the complaint.

3. On March 20, 1968, with the knowledge of the plaintiff and in reliance on plaintiff's failure to object thereto or take other restraining action, this defendant entered on subject land described in paragraph 1 of the complaint, and in the exercise of good faith and due diligence, on March 26, 1968, defendant completed a producing gas well on subject land at a cost of $104,500.87.

4. Plaintiff, therefore, is barred by laches from maintaining this action.

WHEREFORE, this defendant demands judgment that this action be dismissed, that plaintiff take nothing thereby and that this defendant receive its costs herein expended, and such other, further and general relief as this Court may deem proper.

COUNTERCLAIM BY
UNITED FUEL GAS COMPANY

This defendant alleges that while holding the subject land, described in paragraph 1 of the complaint, under its lease ratification agreement, amended lease agreement and Declaration-Notice of Unitization, described in paragraphs 7 and 8 of the complaint, and believing its said titles to be good and valid, this defendant made sundry permanent improvements in the amount of $104,500.87 on subject land.

WHEREFORE, this defendant prays, in the alternative, that in the event that the complaint of the plaintiff is sustained for her claimed one-fourth (1/4th) interest in

subject land, that this defendant be allowed, against the plaintiff, for such improvements, the fair and reasonable value of one-fourth (1/4th) of its improvements in the amount of $104,500.87 made on subject land.

/s/ Herbert W. Bryan
HERBERT W. BRYAN
/s/ Wm. Roy Rice
WM. ROY RICE
P. O. Box 1273
Charleston, W. Va. 25325
Attorneys for Defendant
United Fuel Gas Company

Of Counsel
C. E. Goodwin
P. O. Box 1273
Charleston, W. Va. 25325

[Certificate of Service Omitted]

IN THE CIRCUIT COURT OF
KANAWHA COUNTY,
WEST VIRGINIA

Civil Action No. 8310

[Title Omitted]

[Filed January 2, 1969]

INTERROGATORIES

To: Wm. Roy Rice,
Attorney For Defendant
United Fuel Gas Company,
P. O. Box 1273,
Charleston, West Virginia.

The plaintiff, requests that the defendant, United Fuel Gas Company, answer (under oath), in accordance with Rule 33 of The West Virginia Rules of Civil Procedure, the following interrogatories:

DEFINITIONS

(A) "You" or "your" means the defendant corporation answering these interrogatories, its domestically domiciled subsidiaries and its merged or acquired predecessors, its present and former officers, agents and all other persons acting on behalf of the defendant corporation or such subsidiaries or such predecessors.

(B) "Document" means any written, recorded or graphic matter however produced or reproduced.

(C) "Identify" or "identification" when used in reference to an individual person means to state his full name if known and his present or last known position and business affiliation. "Identify" or "identification" when used in reference to a document means to state the type of document (e.g. letter, memorandum, telegram, chart etc.),

or some other means of identifying it, and its present location or custodian. If any such document was, but is no longer in your possession please state what disposition was made of it.

(D) Except where otherwise stated, each interrogatory requests information for the period from January 1, 1966, to October 16, 1968.

(E) "Point of ultimate conversion" means the point in the transmission of natural gas, or other hydrocarbon derivatives, where it loses its identity as the gas or part of the gas that comes from an individual well or in the alternative at the most remote point(s) that point(s) where it passes from your control and dominion.

(F) "Immediate surrounding area" means any place within a five mile radius of the location of the Sarah A. Null Well, Kanawha Permit No. 2232, issued by the Oil and Gas Division of the West Virginia Department of Mines.

(G) "The Well" means the Sarah A. Null Well, Kanawha Permit No. 2232, as issued by the Oil and Gas Division of the West Virginia Department of Mines, unless otherwise excluded by the context of the question.

(H) "Mineral interest" means any or all interest a person (whether an individual or a corporation) has or at one time had at or during the specified period, or to which a person (whether an individual or a corporation) has held or at any time at or during the specified period held a justiciable claim as would be dictated by the ordinary prudent practices used in the industry in obtaining the right to explore, drill and operate for natural gas production and also being such interest as is contemplated by the phrase, " . . . Notice of any adverse claim, . . . " contained in paragraph six (6) of an agreement dated December 27, 1967, by and between Marvin Null and Sarah Ann Null, his wife, et. al. and United Fuel Gas Company, which agreement is referred to in paragraph seven (7) of the complaint. When referring to the mineral interest of the plaintiff it is to be assumed for the purposes of answering these interrogatories that this shall

mean a one-fourth (1/4th) of all the oil and gas and gasoline, and oil and gas substances in and underlying the tract or parcel of land described in paragraph number one (1) of the complaint.

I. ATTEMPTS BY THE DEFENDANT, UNITED FUEL GAS COMPANY, TO LEASE OR OTHERWISE OBTAIN ALL OR PART OF THE INTEREST OF THE PLAINTIFF, CECLE G. PEARSON, IN A MINERAL INTEREST DESCRIBED IN PARAGRAPH ONE (1) OF THE COMPLAINT, AND OTHER POLICY CONSIDERATIONS.

(1) State whether you communicated orally during the period from January 1, 1967, to March 26, 1968. with the plaintiff, her husband, H. C. Pearson, Sr., or any other person acting as agent or purporting to act as agent or otherwise on behalf of the plaintiff, or with any other intermediary, through statements referring to or relating in any way to the arrangement of a lease of any or all of the mineral interest of the plaintiff.

(2) As to each instance involving an affirmative answer to paragraph one (1), immediately preceding, state as to each communication:

(a) whether made in person or by telephone;
(b) the date and place;
(c) the content of the communication;
(d) whether or not a written record of the communication was made as disclosed in any corporate or internal record;
(e) an identification of each person who participated in the communication or who had knowledge thereof;
(f) an identification of each document referring or relating to the subject matter of subparagraph (d);
(g) what facts compelled or caused this approach(s) as described in paragraph number one (1) to be made.

(3) State whether or not your company has or has had any policy concerning drilling a gas well where it has not been possible to obtain a lease or other agreement to drill a gas well from a nonconsenting cotenant in dealing with

mineral interests where all other outstanding interests were under lease by you, and successful exploration for natural gas in commercially producible quantities had been undertaken and was continuing to be undertaken by you and your competitors in the immediate surrounding area?

(4) As to any affirmative answer to paragraph (3), immediately preceding, please identify and state this policy.

(5) State your policy with respect to the retention of records and identify any directive or other writing which sets forth such policy.

II. PRODUCTION AND PRODUCTIVE CAPACITY OF THE WELL AND WELLS IN THE IMMEDIATE SURROUNDING AREA.

(1) Has the well been produced at any time between March 26,1968, and the date of this interrogatory?

(2) If the answer to paragraph number one (1) is yes, please state the production in thousand cubic feet of gas or other unit of measure used in the industry for commonly used accounting periods falling between March 26, 1968, and the date of this interrogatory.

(3) To whom is the production of this well sold?

(4) If more than one product is sold from the well, please identify all such production, according to commonly used identification in the industry.

(5) What price has been obtained for all such production as identified in paragraph four (4) immediately preceding?

(6) If the gas has been produced from the said well, and is put into your line(s), please state the point of the ultimate conversion of this gas?

(7) At this point of ultimate conversion, referred to in paragraph six (6), immediately preceding, what price is placed by you on the gas produced from the well?

(8) How is the price referred to in paragraph seven (7), immediately preceding, computed by you?

(9) For each of the following wells referred to by permit

numbers in subparagraph (d), in this paragraph, in Putnam and Kanawha Counties, West Virginia, respectively, as said numbers are issued by The Oil and Gas Division of the West Virginia Department of Mines, please state the following:

(a) do you have a contract to purchase the gas produced from the well?

(b) if the answer to subparagraph (a) is yes, please state whether or not there is any document referring to this agreement(s)?

(c) if a written document(s) exists as referred to in subparagraph (b), please give an identification of each document referred to or relating to the subject matter or subparagraph (b)?

(d) the wells referred to for which an answer to subparagraphs (a), (b) and (c), is requested are numbered according to permit numbers as follows:

Put-725, Put-726, Put-727, Put-731, Put-732, Put-735, Put-739, Put-741, Put-743.

Kan-454-D, Kan-667-D, Kan-2084, Kan-2093, Kan-2094, Kan-2095, Kan-2097, Kan-2098, Kan-2106, Kan-2111, Kan-2115, Kan-2125, Kan-2152, Kan-2155, Kan-2160, Kan-2162, Kan-2174, Kan-2176, Kan-2178, Kan-2179, Kan-2180, Kan-2181, Kan-2182, Kan-2187, Kan-2190, Kan-2191, Kan-2192, Kan-2196, Kan-2199, Kan-2200, Kan-2204, Kan-2206, Kan-2207, Kan-2210, Kan-2211, Kan-2214, Kan-2217, Kan-2220, Kan-2221, Kan-2223, Kan-2224, Kan-2226, Kan-2228, Kan-2230, Kan-2231, Kan-2297.

(10) For each of the following wells referred to by permit numbers in subparagraph (d), in this paragraph in Kanawha County, as said numbers are issued by The Oil and Gas Division of the West Virginia Department of Mines, please state the following:

(a) do you have a contract to purchase the gas produced from the well?

(b) if the answer to subparagraph (a) is affirmative,

please state whether or not there is any document referring to this agreement(s)?

(c) if a written document(s) exists as referred to in subparagraph (b), please give an identification of each document referred to or relating to the subject matter of subparagraph (b)?

(d) the wells referred to for which an answer to subparagraphs (a), (b) and (c), is requested are numbered according to permit numbers as follows:

Kan-2215, Kan-2234, Kan-2235, Kan-2243, Kan-2244, Kan-2245, Kan-2248, Kan-2250, Kan-2258, Kan-2260, Kan-2263, Kan-2265, Kan-2266, Kan-2276, Kan-2277, Kan-2279, Kan-2284, Kan-2285, Kan-2287, Kan-2289, Kan-2291, Kan-2293, Kan-2294, Kan-2295, Kan-2296, Kan-2298, Kan-2302, Kan-2306, Kan-2310, Kan-2314.

(11) Does a contractural arrangement exist to sell the production from the Sarah A. Null Well, Permit No. 2232, previously defined as the well?

(12) If a written document exists, reciting any agreement as may be referred to in paragraph (11), immediately preceding, please give an identification of each document(s) referring to or relating to the subject matter of paragraph (11), immediately preceding.

(13) If the following estimate has been made by the defendant, what is the estimated commercial life of the well?

III. COST AND GEOLOGICAL REASON FOR LOCATION OF THE WELL

(1) Please state whether a document exists itemizing the cost of drilling, equipping, and completing the well?

(2) If the answer in paragraph (1), immediately preceding, is affirmative, please give an identification of each document referred to in the preceding paragraph.

(3) Please state whether or not any geological reports were used to determine in any way the location of the well on the property described in paragraph (1) of the complaint.

(4) If the answer to paragraph (3), immediately preceding, is affirmative, please give an identification of each document to which reference is made.

(5) Were there any reasons from the standpoint of drilling a successful, commerically producible well, using geological considerations, but not relying on the geological consideration as a sole criteria, why it was better to locate the well site on the Sarah A. Null 68 acres than on any other piece of land or mineral interest in the unitization agreement recorded in the Office of the Clerk of the County Court of Kanawha County in Lease Book 170, at page 225, which is referred to in paragraph (8) of the complaint.

(6) If the answer to paragraph (5), immediately preceding is affirmative, please state the reasons.

(7) Has the well ever been produced at a rate of flow of natural gas from the Newburg Sand, which exceeded its initial open flow capacity as reported before fracturing?

(8) Is it, contemplated that the well will be produced beyond its rated initial open flow capacity before fracturing at any time in the future?

(9) If the answer to both paragraphs (7) or (8) immediately preceding is negative, please state the reasons for the fracturing process?

(10) Did the decision to fracture the well have anything to do with any proration of production policy initiated or followed by you in the development of the immediate surrounding area?

(11) If the answer to paragraph (10) immediately preceding is affirmative, please state the policy which caused the decision to fracture the well?

IV. RATIFICATION AGREEMENT

Upon what information obtained at any time after January 1, 1956, did you base the following recital contained in a lease ratification agreement referred to in paragraph (7) of the complaint by and between United Fuel Gas Company, and W. P. Dodd and Ernestine Dodd, his

wife, which is dated February 17, 1967, and recorded in the Office of the Clerk of the County Court of Kanawha County, in Lease Book 164, at page 314, which recital states as follows:

> "Whereas, one Cecle G. Pearson owned an interest in the aforesaid tract of land, but did not join in the said lease agreement of December 27, 1957, and,"

V. PRORATION OF THE PRODUCTION FROM WELLS IN THE IMMEDIATE SURROUNDING AREA.

(1) Do you have a policy of proration of production from all wells listed in paragraph (9) of Interrogatory II, which are connected to your gathering system?

(2) Do you have a policy of proration of production from all wells listed in paragraph (10) of Interrogatory II, which are connected to your gathering system?

(3) If the answer to paragraph (1) or (2) immediately preceding is affirmative, please state and describe this policy in either instance of an affirmative answer and consecutively in the event of two affirmative answers.

(4) Do you have or plan to have a policy of proration of production from wells drilled in the immediate surrounding area which are not included in either paragraphs (9) or (10) of Interrogatory II?

(5) If the answer to paragraph (4) immediately preceding is affirmative, please state this policy.

(6) Is production, if any, from the Sarah A. Null Well, Kan-2232, based on any policy of proration of production by you?

(7) If the answer to paragraph (6) immediately preceding is affirmative, please state this policy.

Dated this 31st day of December, 1968.

/s/ Rex Burford
REX BURFORD
Attorney for Plaintiff
Suite 57-58, Capital City Bldg.
Charleston, West Virginia 25301

[Certificate of service omitted]

IN THE CIRCUIT COURT OF
KANAWHA COUNTY,
WEST VIRGINIA

Civil Action No. 8310

[Title Omitted]

[Filed March 3, 1968]

UNITED FUEL GAS COMPANY'S ANSWERS TO INTERROGATORIES, NOT OBJECTED TO, PROPOUNDED BY THE PLAINTIFF

TO: Rex Burford
Attorney at Law
Suite 57-58, Capital City Building
Charleston, West Virginia 25301

The undersigned is advised and believes that Interrogatories Nos. I (2) (c) and (g), (3), (4), (5); II (7), (8), (9), (10), (13), III (6), (8), (9), (10), (11); IV and V are subject to objections by this defendant duly served on the plaintiff on February 28, 1969, and the undersigned is making objection thereto and is not purporting to answer such interrogatories to which objections have been made.

This defendant, United Fuel Gas Company, a corporation, by T. P. Peyton, its Vice President, hereby answers interrogatories, not objected to, filed in this cause by the plaintiff, and numbered respectively, as follows:

I.

(1) During the period from January 1, 1967, to March 26, 1968, this defendant communicated orally, on one occasion, with H. C. Pearson, Sr., plaintiff's husband, and Cullen G. Hall, Attorney at Law, on two separate occasions, both parties acting as agent or purporting to act as agent or otherwise, as stated, on behalf of the plaintiff, referring to or relating to a lease of any of the mineral estate that the plaintiff might have.

(2) (a) (b) (d) (e) and (f): On January 29, 1968, Joseph C. Crim, Superintendent--Land, Leasing and Right-of-Way, called H. C. Pearson, Sr., by telephone. *Pearson was informed that United Fuel Gas Company had a lease agreement from W. P. Dodd, et ux., and that United Fuel desired to locate a well on the subject tract of 68 acres.* Mr. Pearson advised us to contact the Pearsons' attorney, Cullen G. Hall. Except for notes made by Joseph C. Crim, no written report of the communication was made.

On February 6, 1968, Joseph C. Crim talked with Cullen G. Hall, by telephone and repeated to him our desires with reference to subject 68 acres. Except for notes made by Joseph C. Crim, no written record of the communication was made.

Several days later Cullen G. Hall contacted Joseph C. Crim by telephone. Except for notes made by Joseph C. Crim, no written record of the communication was made.

II.

(1) The Sarah A. Null well was turned on April 16, 1968, and was produced from that date to December 31, 1968.

(2) The production from the Sarah A. Null well from April 16, 1968, to January 2, 1969, was 2,039,144 Mcf of gas.

(3) Since the Sarah A. Null well was drilled by United Fuel Gas Company, the production from this well has not been sold and is not being sold to any single customer, but it is being sold after commingling with other gas, as explained in (6) below. However, James S. Ray, a joint operator with United Fuel Gas Company, is entitled to 30.7747% of the production from the Sarah A. Null well by virtue of Ray's holding, as Lessee, other acreage in the area going to make up the 270 acre unit on which the Null well was drilled. Ray's share of the production is being sold to United Fuel Gas Company.

(4) Distillate from the Sarah A. Null well is being sold.

(5) United Fuel Gas Company receives a net price of 5¢ per gallon for all such distillate sold by it.

(6) The gas produced from the Sarah A. Null well is commingled with other gas produced and purchased by United Fuel Gas Company at the junction of United Fuel Gas Company's Line AW-9486 4-inch with Line A-181 10-inch.

(11) A Contractual arrangement does exist for James S. Ray to sell his 30.7747% of the production from the Sarah A. Null well to United Fuel Gas Company.

(12) United Fuel Gas Company's Contract No. 6911 with James S. Ray dated March 26, 1968.

III.

(1) A document exists itemizing the costs of drilling, equipping and completing the Sarah A. Null well.

(2) Work Order No. 1805-2861-12 identifies the document itemizing such costs.

(3) Within this defendant's understanding of the meaning of the term "geological reports," such were not used to determine the location of the Sarah A. Null well.

(4) Negative answer to (3) renders further answer unnecessary.

(5) Yes.

(7) The Sarah A. Null well has never been produced at a rate of flow which exceeded its initial open flow capacity as reported before fracturing.

This 28th day of February, 1969.

/s/ T. P.Peyton
T. P.Peyton
Vice President

[Verification and Certificate of Service Omitted]

IN THE CIRCUIT COURT OF
KANAWHA COUNTY,
WEST VIRGINIA

Civil Action No. 8310

[Title Omitted]

(Filed July 16, 1969]

UNITED FUEL GAS COMPANY'S
ANSWERS TO INTERROGATORIES
OBJECTED TO, WHEREIN
OBJECTIONS WERE OVERRULED

TO: Rex Burford
Attorney at Law
Suite 57-58, Capital City Building
Charleston, West Virginia 25301

This defendant, United Fuel Gas Company, a corporation (hereinafter sometimes called "United Fuel"), by T. P. Peyton, its Vice President, hereby answers interrogatories, filed in this cause by plaintiff, not previously answered, but objected to, wherein objections were subsequently overruled, and numbered respectively as follows:

II.

(7) At the junction of United Fuel's Line AW-9486 4-inch with its Line A-181 10-inch, where the gas produced from the Sarah A. Null well is commingled with other gas produced and purchased by United Fuel, the price for gas is Twenty-eight Cents (28¢). That is the price being paid by United Fuel to James S. Ray for his 30.7747% of the production from the Sarah A. Null well, which price was arrived at by negotiations between the parties to the contract, and is the maximum area rate level prescribed by the Federal Power Commission as the initial price of gas sold

under a new contract in West Virginia and is the rate the Federal Power Commission would authorize (and has authorized) without a price condition or suspension.

(13) The estimated commercial life of the Sarah A. Null well, involving many judgment factors and subject to many incalcuable contingencies (such as, for example, drowning-out, conversion to storage, etc.) is four to five years.

III.

(6) The reasons from the standpoint of drilling a successful, commercially productive well, using geological conditions, but not relying on the geological consideration as a sole criteria, why it was better to locate the well site on the Sarah A. Null 68 acres than on any other piece of land or mineral interest in the unitization agreement recorded in Lease Book 170 at page 225 are: the location of other lands in the area, the surface terrain of the well location site, accessibility to the well location site, and the expense of making the well location site and gaining access to the same, when compared with alternate sites, were considered in locating the well on the Sarah A. Null 68 acres.

(10) The decision to fracture Sarah A. Null well had something to do with proration of production by United Fuel Gas Company in taking gas from the immediate surrounding area.

(11) Gas taken by United Fuel from the Rocky Fork Field, wherein the Sarah A. Null well is located, is taken on a prorata basis.

Due to the limited daily pipeline capacity and the large open flow of wells drilled in the Rocky Fork Field, in an effort to give a fair treatment to all operators from whom United Fuel purchases gas produced from the Field, an absolute open flow is determined by United Fuel for each such well and for its own wells in the Field, prior to initial delivery therefrom, by Isochronal Multipoint Test Method and in accordance with the Interstate Oil Compact Commission Manual of Back-Pressure Testing of Gas Wells,

section III, page 8, dated December, 1962. Additional wells in the Rocky Fork Field from which United Fuel purchases gas and its own wells will be tested in the same manner.

United Fuel plans to take an aggregate volume of 40,000 Mcf of gas per day from the Rocky Fork Field during the winter months, exclusive of volumes of gas previously contracted for by United Fuel from Jamaco Properties, Inc. (Jamaco), by contract dated January 12, 1967, known and designated as Contract # 6770. Subject to the conditions, provisions and exceptions of its form gas purchase contract, United Fuel agrees to take a pro rata share of such 40,000 Mcf per day from each well in the Field from which United Fuel is receiving gas (which term as used in its contract will include its own wells in the Field), except the well owned by Jamaco, as determined by the ratio of the absolute open flow of such well to the total absolute open flow of all the wells in the Field from which United Fuel is receiving gas, when the total deliverable production of such wells equals or exceeds 40,000 Mcf per day. Such pro rata share of 40,000 Mcf per day shall be the allowable daily delivery for such well.

This 15th day of July, 1969.

/s/ T. P. Peyton
T. P. PEYTON
Vice President

[Verification and Certificate of service omitted]

IN THE CIRCUIT COURT OF
KANAWHA COUNTY,
WEST VIRGINIA

Civil Action No. 8310

[Title Omitted]

[Filed December 19, 1969]

DISCOVERY DEPOSITION OF CECLE G. PEARSON

* * * * *

[See p.p 4-9 of Reporter's Transcript]

Q Mrs. Pearson, starting at the time that you acquired the property from H. C. Pearson, Jr. by deed, let's say up to 1960, how were the taxes paid for the 68 acre mineral interest that you are claiming? A My husband always paid the taxes. I never paid a tax in my life.

Q It is fair to say that if the taxes were paid, your husband paid them? A My husband paid the taxes.

Q Is it fair to say that if the taxes assessed against the property weren't paid, that was your husband's responsibility also? A I will say that.

Q Mrs. Pearson, along about 1961, assuming for the sake of the question, that the 1961 taxes were not paid, do you have any recollection of any reason why the 1961 taxes were not paid? A None whatsoever.

Q Mrs. Pearson, have there been any contacts directly by you to United Fuel Gas Company concerning your claim in the 68 acres we are talking about? A I don't just exactly understand that now.

Q Let's say as recently as starting in 1966 and

coming up to the present time, have you personally, in person or by phone, or by letter made any contacts to United Fuel concerning your interest in the 68 acres? A If there was ever any contact, if they ever called me, I referred them to my husband. I never talked to them myself. I said, "You will have to talk to my husband." He always took care of things like that.

Q You never initiated any contacting to United Fuel? A No; not myself.

Q Mrs. Pearson, is it fair to say that these contacts, the alleged contacts by Mr. H. C. Pearson, your husband, to United Fuel Gas Company would have been on your behalf? A Oh yes.

Q And would they be at your direction? A Yes; and his direction too, because I just depended entirely on him.

Q These contacts by Mr. Pearson to United Fuel have been made as your agent? A Yes; that is right.

MR. RICE: That is all.

EXAMINATION BY MR. HAMB

Q Mrs. Pearson, you have stated earlier that at the time your son conveyed this interest to you that he was ill. Was he over the age of twenty-one at that time? A Yes.

Q What was the nature of his illness? A Tuberculosis.

Q Was that an absolute conveyance to you, or were you to reconvey it to him at a later time? A Oh, no; absolutely.

Q What consideration, if any, did you pay for the transfer? A None.

Q Then it was a gift? A It was a gift.

Q From that time up until 1961, the taxes were paid on this property, I think you stated, by your husband? A That is right.

Q What do you understand to be your interest under the deed your son gave you? A Well, I would say whatever interest there was there.

Q Then you knew at that time that you were the owner of an undivided one-fourth interest? A Yes, sir.

Q Mrs. Pearson, why were the taxes not paid for the year 1961? A Well, you will have to ask my husband because I never pay taxes.

Q Did you know that during the year 1962 that the property was sold to the State for non-payment of the 1961 taxes? A No; I didn't know anything about it.

Q When did you first become aware of that? A Well, it seems as though someone from United Fuel called and said it had been sold and someone had bought it — Mr. Hamb — no; Mr. Dodd had bought it.

Q When was this, Mrs. Pearson, as best you recall? A I can't remember.

Q Do you recall if it was before or after United Fuel completed the drilling of a well on this tract? A Oh, before.

Q How long before? A I don't know when the well was drilled and I can't say how long, but it was months before.

Q During the time that your husband was, in fact, paying taxes on this property, was it your intention to have him pay taxes on your full interest in the property? A He has always paid taxes. I know nothing about taxes.

Q Do you understand that after the year 1962 when the property was sold to the State, that you had a period of time during which you might redeem it by paying it to the Auditor of this State? A Well, I didn't know anything about the taxes being delinquent.

Q Have you ever had any conversation with Mr. Dodd? A No; I have never talked to Mr. Dodd.

Q What evidence do you have to show that the well of United Fuel Gas Company is, in fact, located on the tract you have an interest in? A What evidence do I have that it isn't?

Q That it is. A Well, I have a map which Mr. Burford showed me that it was on.

Q When did you first ascertain that the well was located on the tract you had an interest in? A When Mr. Burford informed me.

Q Recently you caused a Redemption Certificate to be issued by the State Auditor; is that correct? A I guess my husband took care of that. I know that I know about it. He took care of all of this affair.

Q What— A Whatever my husband did, he did it for me.

* * * * *

[See p. 10 of Reporter's Transcript]

Q What is your address? A 582 Strawberry Road.

Q That is in Kanawha County? A Yes, sir.

Q How long have you lived at that address? A We've lived there about 21 years, soon be 22 years.

Q During the past 21 or 22 years, have you lived at any other address? A No.

Q Have you ever lived outside of the State of West Virginia? A No.

* * * * *

[See p.p. 10 and 11 of Reporter's Transcript]

Q Mrs. Pearson, has your address recently been changed? A Yes; it has, for the last few months.

Q What is the new address? A The new address is what I gave him.

Q What was the old address? A Route 1, Box 51.

* * * * *

IN THE CIRCUIT COURT OF
KANAWHA COUNTY,
WEST VIRGINIA

Civil Action No. 8310

[Title Omitted]

[Filed December 19, 1969]

DISCOVERY DEPOSITION OF
HENRY CLINTON PEARSON

* * * * *

[See p.p. 11-17 of Reporter's Transcript]

Q Please state your name. A My full name or the way I usually write checks?

Q Your full name. A Henry Clinton Pearson.

Q How old are you? A I was eighty-four years old on May 2.

Q What is your present address? A 582 Strawberry Road.

* * * * *

Q Mr. Pearson, when you and I were getting acquainted, I got the impression that you have some background in oil and gas work and dealings. Would you tell me what that background is? A Well, do you want it all?

Q Just start generally and when we get enough, we will terminate it. A I spent almost sixteen years with Ohio Fuel Oil Company.

Q In what capacity? A As engineer and Land Department man. I had charge of both of those departments for at least twelve years.

Q Are you trained as a civil engineer? A Yes, sir.

Q When did you leave Ohio Fuel? A I left them in May of 1927.

Q Has your experience in oil and gas work continued from 1927 up until the present time? A Yes; to some extent.

Q What is the nature of that experience? A Well, I own properties, oil and gas properties in Kentucky and some in West Virginia. I have helped drill several wells with your company.

Q Mr. Pearson, do you own a number of tracts of land and have them under lease to sundry companies in this area? A Well, a few years ago I expect I had fifty, sixty or seventy tracts; but I sold most of my tracts in Jackson County to Star Gas Company, six or seven years ago – that is just guessing. I have several pieces leased to your company.

Q Mr. Pearson, you say you drilled several wells? A In other words, I had a working interest with Mullins Gas Company and a few with United Fuel.

Q Did you actually drill the wells? A No, sir.

Q You have an interest in the seven-eights working interest? A I have what I call an operating or a working interest. Of course, I have some royalty interests.

Q Mr. Pearson, Mrs. Pearson has said that you took care of the taxes on the tract of land we are talking about, the 68 acres. Would you tell us briefly the history of the payment of the taxes on that tract of land? A Well, I can't tell you the whole history. I can tell you this: I paid those taxes for years and years. Here is the way I have handled it. I have always notified the Sheriff and the Assessor of my address, where to send my tax notices, and evidently I didn't get no notice or I would have paid it.

Q With reference to the 68 acre tract of land, do you recall the deed from H. C. Pearson, Jr. to Mrs. Cecele Pearson? A Yes; he deeded a number of tracts, some in Kentucky, some out through Poca and everywhere.

Q Let's say in 1938 coming towards the year 1960, how were the taxes assessed on the 68 acres of land? A H. C. Pearson, Jr.

Q Did you look after the payment of that tax ticket for the years 1937 to 1960? A Yes, sir.

Q That was your obligation? A Yes; I paid them. Anytime I got a tax notice, I made a check for it and paid it.

Q You knew you had to have a tax ticket on the 68 acre interest? A I knew there was supposed to be one.

Q You knew you were getting one? A I would say for twenty or twenty-five years I did.

Q Starting in 1937? A It wouldn't be in effect before 1938. That deed wasn't made until 1937 to her.

Q But the tax ticket would be made out to H. C. Pearson, Jr. for the 68 acre mineral interest that this litigation is about and you, Mr. Pearson, would look after the payment of that tax ticket? A Well, it did come that way. It shouldn't have come back that way. It should have come out in her name. I paid them.

Q It did come out in H. C. Pearson Jr.'s name? A That is right.

Q Would you recall who paid the 1958 taxes, if they were paid? A '58?

Q 1958. A I must have paid them. I paid all of them that came. The one didn't come.

Q If they were paid in 1959 in H. C. Pearson Jr.'s name, you would have paid them? A That is right.

Q If they were paid in 1960 in H. C. Pearson Jr.'s name, you would have paid them? A I paid them all.

Q We are both familiar with the fact that the tax ticket in H. C. Pearson Jr.'s name for the 68 acres mineral interest in 1961 was not paid. A I didn't know that.

Q We both know that W. P. Dodd bought that interest at a tax sale; don't we? A That is what I have been informed.

Q Now, Mr. Pearson, do you recall why that tax ticket was not paid? A No; I do not – just an oversight, purely an oversight.

Q If that tax ticket in the name of H. C. Pearson, Jr. for the 68 acre mineral interest would have come to you, or if you had been familiar with it you would have paid it? A If it had come to me, I would have paid it; yes.

Q As an assessment against the interest that Mrs. Cecele Pearson claimed? A I am still paying taxes on everything she owns out there.

Q What is the answer to my question? A What is the question?

Q My question is if you had been familiar or had known about a tax ticket in the name of H. C. Pearson, Jr. for the year 1961 for the 68 acre mineral interest, you would have paid that tax ticket as an assessment against Mrs. Cecele Pearson's property? A Do I understand his question? What does he mean by assessment against Mrs. Pearson?

Q Well, Mrs. Pearson claimed to own the 68 acres. A She did own it.

Q Let's say that she did own it. If you had known of a tax ticket in H. C. Pearson, Jr.'s name, in his name but against the 68 acres that Mrs. Cecele Pearson claimed and owned, then you would have paid it? A Absolutely.

* * * * *

[See p.p. 27-32 Reporter's Transcript]

Q Mr. Pearson, do I understand that during the entire time your wife held the title to an undivided one-fourth interest in this 68 acre tract, that you personally paid all the taxes up to the year 1960? A That is true.

Q You paid those taxes for your wife's interest in that property? A That is true.

Q Now, you stated earlier that you had a conversation with Mr. Miller from United Fuel Gas Company during the approximate period of February of 1967 concerning this matter. A I don't have any recollection of that conversation. The only one I have is on November 21, 1967.

Q Would that be Mr. Jack Miller? A I don't know his first name. He might have told me at the time but I don't recall. He did tell me he was connected with United Fuel Gas Company.

Q You stated, I believe, at that time you first obtained knowledge that your undivided one-fourth interest had been sold for taxes and purchased by Mr. Dodd? A That is the first knowledge I had.

Q Since November of 1967, have you personally made any contact with Mr. Dodd? A I never had any contact with him. I wouldn't know him if he walked in here.

Q Have you ever made any demand on him for the return of your interest, either personally or through an attorney? A That is in the hands of our attorney, Mr. Cullen G. Hall.

Q Now, the fact that this property was assessed in the name of H. C. Pearson, Jr. made no difference to you in the payment of these taxes; did it? A No; on a lot of other property I paid his taxes.

Q Knowing full well that the property actually belonged to your wife, though it was assessed in his name, you paid it as your wife's property? A That is right.

Q When you paid taxes on this piece of property, you were paying the taxes on her full interest, whatever it may have been? A I think the tax ticket said a one-fourth interest.

Q You were paying on a one-fourth interest as you were paying the taxes? A A great number of years.

Q Did you ever have any conversation with anyone in the Kanawha County Assessor's Office concerning the fact that the property was assessed in the name of H. C. Pearson, Jr. when it was, in fact, the property of your wife? A I don't recall of any.

Q You never made any objection to that? A Why should I? I was paying all his taxes and other expenses for him.

Q Mr. Pearson, following your conversation in November of 1967 with Mr. Miller of United Fuel, you caused a redemption to be assessed in the State Auditor's Office concerning an undivided interest in this tract of land. Would you tell us when you concluded to take that action? A That was concluded by our attorney, he made the redemption, Mr. Hall.

Q Did you participate in any way with making the redemption? A I approved it.

Q What was your reason for taking that action? A That was counsel's advice, Mr. Hall.

Q Did you employ Mr. Hall to take care of that redemption for you? A That is a silly question. I told you the whole thing was turned over to Mr. Hall along the latter part of November in 1967 or early December. It was in his hands then.

Q Mr. Pearson, I will ask you again: Did you request Mr. Hall to make the redemption; yes or no? A He talked it over with me and I approved it.

Q Mr. Pearson, you personally own real restate; do you not? A Yes.

Q You have owned real estate, I take it, for a good number of years? A Well, 1904 to be exact, off and on a long time.

Q Your wife has always owned property, at least during the entire period of your marriage? A No; not the entire period. She has owned oil and gas interest since 1936 or 1937, both here and in Kentucky.

Q Both of you have understood that you are under an obligation to pay real estate taxes on property which you owned? A That is a natural thing, of course. Naturally I understand it.

Q You understand that if the taxes are not paid on your property when assessed, that they will be sold by the Sheriff of the county where the property is situated. A That is customary, I think.

Q But you have been aware of that; haven't you, for a good number of years? A I wouldn't say how many years, but I have always known taxes had to be paid sooner or later.

* * * * *

[See p. 32 Reporter's Transcript]

A Yes; the Sheriff did not mail the tax notice. It was an oversight.

Q Let me ask you: Did you ever receive any notice from William B. Maxwell, III, as a Deputy Commissioner. A No.

Q Did your wife ever receive such notice? A No; none whatsoever.

Q Did you ever make an inquiry of Mr. Mawell's office concerning the amount to redeem the property? A No.

Q Did you ever make an inquiry of Mr. John Fisher, State Auditor, to redeem the property? A You mean the property in question?

Q Yes.

* * * * *

[See p. 41 Reporter's Transcript]

[A] * * * He requested that we make a lease to United Fuel Gas Company covering Mrs. Pearson's interest in that 68 acre Null tract of land.

Q What was the purpose of that conversation? A He just told me he wanted Mrs. Pearson and I to lease her

interest to the United Fuel Gas Company in the 68 acre Null tract.

Q Did you also make a written memorandum of this conversation with Mr. Crim? A That is right; I did.

Q Did Mr. Crim tell you anything else at that time concerning your position, or your wife's position and Mr. Dodd? A The only thing he said was he wanted us to make a lease and Mrs. Pearson and I could fight it out with the Dodds.

Q Were these his exact words? A That is the way I remember it, the way I jotted it down at the time.

IN THE CIRCUIT COURT OF
KANAWHA COUNTY,
WEST VIRGINIA

Civil Action No. 8310

[Title Omitted]

[Filed December 19, 1969]

DISCOVERY DEPOSITION OF
JOSEPH CALVIN CRIM

[See p. 9 Reporter's Transcript]

* * * * *

Q Mr. Crim, would you please state your full name? A Joseph Calvin Crim.

Q And your age? A Forty-three.

Q Where do you work? A United Fuel Gas Company.

Q How long have you worked for this company? A Sixteen years.

Q Are you a lawyer? A Yes.

* * * * *

[See p. 16 Reporter's Transcript]

Q Mr. Crim, as an attorney, on January 29, 1966, was it your opinion that the proceedings by which Mr. Dodd allegedly acquired this mineral interest was such that you could not recommend to your employer, United Fuel Gas Company that a well be drilled on this Sarah Ann Null site without also first obtaining a lease of the interest from Cecle G. Pearson? A Let me qualify my answer. My job is to get as good a title for operations as we can; and it is very difficult for me to say that a title is marketable when there is a known claim being asserted against it.

The only objection I could find in the title was the fact that there was a person actively asserting a claim that the Dodd title was not the better title.

Q You made this call to protect United Fuel Gas Company? A I made this call to protect United Fuel Gas Company from the inconvenience of claims being asserted and from a possible litigation.

* * * * *

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Civil Action No. 8310

[Title Omitted]

[Filed July 9, 1971]

ORDER

This day came the defendant, United Fuel Gas Company, a corporation, by Wm. Roy Rice, its attorney, Columbia Gas Transmission Corporation, a Delaware corporation, by Wm. Roy Rice, its attorney, the defendants W. P. Dodd and Ernestine Dodd, his wife, by William E. Hamb, their attorney, and Cecle G. Pearson, plaintiff, by Rex Burford, her attorney, upon the Motion to Substitute Columbia Gas Transmission Corporation, A Delaware corporation, as a party defendant, in the place and stead herein of United Fuel Gas Company, a defendant; and the Court after having examined said Motion, and there being no objection thereto, is of the opinion to grant the same.

It is therefore ADJUDGED and ORDERED that Columbia Gas Transmission Corporation, A Delaware corporation, be and it is hereby substituted as a party defendant herein in the place and stead of United Fuel Gas Company, a West Virginia corporation.

Dated this 9th day of July, 1971.

ORDER

ENTER

/s/ Frank L. Taylor
FRANK L. TAYLOR
Judge

[Attorney's signatures omitted]

IN THE CIRCUIT COURT OF
KANAWHA COUNTY,
WEST VIRGINIA

Civil Action No. 8310

[Title Omitted]

[Filed July 9, 1971]

ORDER

It appears to the Court that there are several issues in this action. The central issue is whether or not the plaintiff, Cecle G. Pearson, owns all or any part of the oil and gas interest asserted in the complaint filed herein, and whether or not the tax deed described in the complaint filed in this action and the other instruments based thereon, be set aside as a cloud upon the title of the plaintiff in and to the said oil and gas interest.

Upon agreement of all parties, by their respective counsel, the Court expressly determines that there is no just reason for delay in determining this issue, defenses thereto or counter-claims, *but* expressly postpones the matter of an accounting related thereto until this judgment is made.

Upon agreement of all parties, by their respective counsel, the plaintiff will file her brief by August 16, 1971, the defendants will file their briefs by October 15, 1971, and the plaintiff will file a reply brief by October 30, 1971.

Thereupon, this issue is submitted, upon the stipulations heretofore filed herein, upon Interrogatories, Answers thereto and the Depositions of Myron Maurice Miller, Joseph Calvin Crim, Cecle G. Pearson and Henry Clinton Pearson, which Interrogatories, Answers and Depositions are hereby

ordered filed and upon the other pertinent portions of the record, all of which is adjudged, ordered and decreed.

Date: July 9, 1971.

Order

Enter

/s/ Frank L. Taylor, Judge
FRANK L. TAYLOR, JUDGE

[Attorney's Signatures Omitted]

IN THE CIRCUIT COURT OF
KANAWHA COUNTY,
WEST VIRGINIA

Civil Action No. 8310

[Title Omitted]

[Filed July 9, 1971]

STIPULATION

* * * * *

D. From February 20, 1937, to the date of these stipulations, the said Cecle G. Pearson has been and is a married woman who is *sui juris*. H. C. Pearson, Jr. died January 4, 1958, in Kanawha County, West Virginia, a resident of said county and State. Cecle G. Pearson married H. C. Pearson, Sr., May 4, 1910, and they have both resided on Strawberry Road, near the town of St. Albans, Kanawha County, West Virginia, at least from the year 1937 to the filing of this action.

E. In a record book in the Office of the Clerk of the County Court of Kanawha County, West Virginia, entitled "Land Book" for the years 1938 through 1968, inclusive, is a list of entries made by the Assessor of Kanawha County, West Virginia, pertaining to said property. Certified copies by the County Clerk of Kanawha County, West Virginia, are stipulated to be true copies thereof, and are hereto attached as Plaintiff's Exhibit No. "4". (Consisting of 31 pages with the 1st page marked as Exhibit No. "4"). Except as expressly noted, in each year the pertinent entry is that one in the name "PEARSON H C JR". The exceptions are: in 1938 wherein the pertinent entry is that one in the name "O DELL W H & H C PEARSON JR"; and, in 1967 and 1968 wherein the pertinent entry is "DODD W P 68A 1/4 O & G Int WATERS MARTINS BRANCH".

F. In a record book in the Office of the Clerk of the County Court of Kanawha County, West Virginia, entitled "Delinquent Book 1961" is a list of real estate in the County of Kanawha delinquent for the non payment of taxes. A true copy of page 18 of 25 pages from this book containing an entry pertaining to said property contested in this action is hereto attached as Plaintiff's Exhibit No. "5". The pertinent entry is that one in the name "PEARSON H C JR".

G. In a record book in the Office of the Clerk of the County Court of Kanawha County, West Virginia, entitled "Land Sales Union 1950 THRU 1961" is the list of sales, suspensions, and redemptions of delinquent land sales made by the Sheriff of Kanawha County, West Virginia, between 1950 and 1961. A true copy of a page from this book containing a entry pertaining to said property contested in this action is hereto attached as Plaintiffs Exhibit No. "6". The pertinent entry is that one in the name "PEARSON H C JR".

H. In a record book in the Office of the Clerk of the County Court of Kanawha County, West Virginia, entitled "Land Sales Union 1962 THRU 1972" is the list of sales, suspensions, and redemptions of delinquent land sales made by the Sheriff of Kanawha County, West Virginia, between 1962 and 1965. A true copy of a page from this book in the year 1962 for 1961 containing an entry pertaining to said property contested in this action is hereto attached as Plaintiff's Exhibit No. "7". The pertinent entry is the one in the name "PEARSON H C JR".

I. In a record book in the Office of the Clerk of the County Court of Kanawha County, West Virginia, entitled "List of Real Estate Purchased for State . . . For year 1961" is a list of real estate purchased for the State of West Virginia by the Sheriff, an affidavit of the Sheriff dated December 19, 1962, as to the list of real estate purchased for the State of West Virginia, a certification by the County Clerk of the County Court of Kanawha County, West Virginia,

reciting receipt by the said Clerk of the foregoing list from the said Sheriff, on December 19, 1962, and a certification by the said Clerk of the binding of the foregoing list in a permanent book in his office and the transmittal by him of a copy thereof to the auditor of the State of West Virginia, all on December 19, 1962. A true copy of the said affidavit and certification is hereto attached as Plaintiff's Exhibit No. "8".

J. In a record book in the Office of the Clerk of the County Court of Kanawha County, West Virginia, kept for the filing of the reports of the State Commissioner of Forfeited and Delinquent Lands is a document with a Certification No. 9504 in the year 1964 for the year 1961. A true copy thereof by the County Clerk of Kanawha County, West Virginia, is stipulated to be a true copy thereof, and is hereto attached as Plaintiff's Exhibit No. "9".

K. On January 31, 1966, there was filed in the Circuit Court of Kanawha County, West Virginia, Civil Action No. 6152, under the style of State of West Virginia, by William B. Maxwell, Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia, Plaintiff vs. L. (Lemuel) Whittington . . . H. C. Pearson, Jr., et als., Defendants. The parties hereto further stipulate, subject to the conditions hereinbefore contained, as follows:

(a) A true copy of the complaint filed in the said action insofar as it is material to this action is hereby attached as Plaintiff's Exhibit No. "10". (Consisting of 13 pages).

(b) Under date of January 31, 1966, the said Circuit Court entered an Order of Publication in the said Civil Action No. 6152. A true copy of the said Order of Publication is hereto attached as Plaintiff's Exhibit No. "11". (Consisting of 5 pages).

(c) On February 23, 1966, there was filed in the aforesaid action by the Charleston Daily Mail an Affidavit of Publication. A true story of the said Affidavit

of Publication is hereto attached as Plaintiff's Exhibit No. "12". (Consisting of 3 pages).

(d) On February 23, 1966, there was filed in the aforesaid action by the Charleston Gazette an Affidavit of Publication. A true copy of the said Affidavit of Publication is hereto attached as Plaintiff's Exhibit No. "13". (Consisting of 3 pages).

(e) On April 11, 1966, the said Circuit Court of Kanawha County entered an Order filing the formal answer of Charles M. Love, III, guardian ad litem, previously appointed in the said action. The aforesaid order also adjudged and ordered the sale for the benefit of the school fund of several parcels including Item No. 12 Certification Number 9504. A true copy of the said order is hereto attached as Exhibit No. "14". (Consisting of 6 pages).

(f) On April 26, 1966, there was filed in the said action an Affidavit of Publication by the Charleston Daily Mail, showing the publication of a "Notice of Sale of Forfeited and Delinquent Lands." A true copy of the said Affidavit of Publication is hereto attached as Plaintiff's Exhibit No. "15".

(g) On April 26, 1966, there was filed in the said action an Affidavit of Publication by the Charleston Gazette, showing the publication of a "Notice of Sale of Forfeited and Delinquent Lands." A true copy of the said Affidavit of Publication is hereto attached as Plaintiff's Exhibit No. "16". (Consisting of 2 pages).

(h) On May 26, 1966, there was filed in the said proceeding "The Report of Sale of William B. Maxwell, Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia." A true copy of the said Report is hereto attached as Plaintiff's Exhibit No. "17". (Consisting of 6 pages).

(i) On May 27, 1966, there was entered in the said action an order of the said Circuit Court in which the sale of the said parcel of land was approved, ratified, and confirmed: it was further ordered that the said Deputy Commissioner, William B. Maxwell, do make, execute, acknowledge, record and deliver . . . an apt and proper deed to the purchaser of the said land. A true copy of the said order is hereto attached as Plaintiff's Exhibit No. "18". (Consisting of 5 pages).

* * * * *

[Approval and Date Omitted]

PLAINTIFF'S EXHIBIT No. 1
STIPULATION OF PARTIES FILED JULY 9, 1971,
CIRCUIT COURT
KANAWHA COUNTY, WEST VIRGINIA

SARAH A. PUGH NULL & HUS #297 RL

TO

W. H. O'DELL TIME 4:29

THIS DEED, made this 21st day of January, 1937, between SARAH A. PUGH NULL, formerly Sarah A. Pugh, and MARVIN NULL, her husband, parties of the first part; and W. H. O'DELL, party of the second part; WITNESSETH:

That for and in consideration of the sum of Ten ($10.00) dollars, cash in hand paid and other good and valuable consideration, the receipt of all which being hereby acknowledged the said parties of the first part DO GRANT unto the said party of the second part, one-half (1/2) of all the oil and gas and gasoline, and all oil and gas substances, in and underlying all that certain tract or parcel of land, situate, lying and being near the source of the waters of Martin's Branch, in Union District, Kanawha County, West Virginia, more particularly described as follows, to-wit:

BEGINNING in an old road at a small sycamore and corner to the lands of James D. Kelly, and running North 86° 30' E. 74 feet to a stone in said creek; thence S. 41° 30' E. 107 feet to a stone at the upper side of the road; N. 50° E. 112 feet to a stone in a drain; S. 62° 30' E. 360 feet to a poplar in a hollow, corner to the lands of Ezell in the original line; thence with old line N. 24° E. 1270 feet to a white oak snag on top of the ridge corner to James Craff's land and Ed Lane; thence with the Craff line N. 32° 30' W. 610 feet to a black oak in said Craff line corner to a tract surveyed for William S. Pugh; thence with a new made line dividing land of Sarah Sarah A. Pugh and William S. Pugh N. 73° 45' W. 521 feet to a

dead top chestnut on hillside; thence N. 76° 45' W. 662 feet to a hickory near top of point; S. 75° 15' W. 1105 feet to a bunch of hickories on top of the ridge in the original line about 12 feet from the gas line; thence along the ridge S. 31° 30' E. 517 feet to a poplar and oak now gone and corner to lands of James Kelley; S. 21° 30' W. 21 feet to a stake in an old road, and following said road S. 13° E. 255 feet to a white oak at the edge of said road; thence S. 55° 30' E. 185 feet to a stake in the road; S. 78° E. 180 feet to a stake in the road; S. 59° 30' E. 505 feet to a stake in said road; S. 42° E. 378 feet to the place of beginning, containing sixty-eight (68) acres, more or less; and is the same tract of land that was conveyed to said Sarah A. Pugh Null, then Sarah A. Pugh, by W. D. Kelley, by deed bearing date the 3rd day of March, 1928, of record in the Office of the Clerk of the County Court of Kanawha County, West Virginia, in Deed Book No. 325 at page 90, to which said deed reference is here made for a more particular description thereof.

Together with all surface and surface rights, rights of way, rights and privileges, necessary or convenient for prospecting, operating and drilling for, extracting, mining, removing, storing, transporting and marketing said oil and gas and gasoline and oil and gas substances, and each of them.

This conveyance is subject to a lease upon the oil and gas and gasoline and oil and gas substances in and underlying the tract of land aforesaid; and also for the consideration aforesaid the said parties of the first part do hereby transfer, set-over, assign, grant and convey unto the said party of the second part one-half (1/2) of all the rents and royalties, and all other benefits, arising and accruing, and hereafter to arise and accrue under such lease, together with the right to collect the same.

And the said parties of the first part do hereby covenant with the said party of the second part that they will warrant

generally the property hereby conveyed, and that the same is free of all liens and incumbrances, except the lease aforesaid.

WITNESS the following signatures.

Sarah A. Pugh Null

(STAMPED $.50) Marvin Null

State of West Virginia,

County of Kanawha, to-wit:

I, C. W. Good, a Notary Public of the said County of Kanawha, do certify, that Sarah A. Pugh Null and Marvin Null, her husband, whose names are signed to the writing above, bearing date the 21st day of January, 1937, have this day acknowledged the same before me in my said County.

Given under my hand this 21st day of January, 1937.

My commission expires September 7, 1944.

C. W. Good
Notary Public

West Virginia Kanawha County Court Clerk's Office Jan 21 1937

This Deed was this day presented to me in my office, and thereupon, together with the Certificate thereto annexed, is admitted to record.

Teste:
PAUL E. WEHRLE Clerk,
Paul E. Wehrle Clerk,
Kanawha County Court

PLAINTIFF'S EXHIBIT NO. 2
STIPULATION OF PARTIES FILED JULY 9, 1971,
CIRCUIT COURT,
KANAWHA COUNTY, WEST VIRGINIA

W. H. O'DELL and wife #1311 CC 3:20

TO-

H. C. PEARSON, JR.

THIS DEED, Made this 8th day of February, 1937, between W. H. O'DELL and MINERVA E. O'DELL, his wife, parties of the first part, and H. C. PEARSON, Jr., party of the second part;

W I T N E S S E T H :

That for and in consideration of the sum of Ten ($10.00) Dollars cash in hand paid, and other good and valuable considerations, the receipt of all which is hereby acknowledged, the said parties of the first part DO GRANT, BARGAIN, SELL and CONVEY unto the said party of the second part one-fourth (1/4) of all the oil and gas and gasoline, and oil and gas substances in and underlying all that certain tract or parcel of land situate, lying and being near the source of the waters of Martin's Branch, in Union District, Kanawha County, West Virginia, more particularly described as follows, to-wit:

BEGINNING in an old road at a small sycamore and corner to the lands of James D. Kelley, and running north 86° 30' E. 74 feet to a stone in said creek; thence S. 41° 30' E. 107 feet to a stone at the upper side of the road; N. 50° E. 112 feet to a stone in a drain; S. 62° 30' E. 360 feet to a poplar in a hollow, corner to the lands of Ezell in the original line; thence with old line N. 24 E. 1270 feet to a white oak snag on top of the ridge corner to James Craff's land and Ed Lane; thence with the Craff line N. 32° 30' W. 610 feet to a black oak in said Craff's line corner to a tract

surveyed for William S. Pugh; thence with a new made line dividing land of Sarah A. Pugh and William S. Pugh, N. 73° 45' W. 521 feet to a dead top chestnut on hillside; thence N. 76° 45' W. 662 feet to a hickory near top of point S. 75° 15' W. 1105 feet to a bunch of hickories on top of a ridge in the original line about 12 feet from the gas line; thence along the ridge S. 31° 30' E. 517 feet to a poplar and oak now gone and corner to lands of James Kelley S. 21° 30' W. 21 feet to a stake in an old road and following said road S. 13° E. 255 feet to a white oak at the edge of said road; thence S. 55° 30' E. 185 feet to a stake in the road S. 78° E. 180 feet to a stake in the road S. 59° 30' E. 505 feet to a stake in said road S. 42° E. 378 feet to the place of Beginning, and containing Sixty-eight (68) acres, more or less;

and being a part of the same property that was conveyed to the said W. H. O'Dell by Sarah A. Null and husband by deed bearing date January 21, 1937, which said deed was duly recorded in the office of the Clerk of the County Court of Kanawha County, West Virginia, on January 21, 1937, to which reference is here made.

For the consideration aforesaid, the said parties of the first part grant such surface and surface rights, rights of way rights and privileges necessary or convenient for prospecting, operating, drilling, extracting, mining, removing, storing, transporting and marketing said oil and gas, and gasoline and oil and gas substances.

This conveyance is subject to a lease upon the oil and gas and gasoline in and underlying the tract aforesaid, and also for the consideration aforesaid, the said parties of the first part do hereby transfer, set over and assign, grant and convey unto the said party of the second part one-fourth (1/4) of all the rents and royalties and all other benefits arising and accruing, and hereafter to arise and accrue under such lease, together with the right to collect the same.

And the said parties of the first part do hereby Covenant with the said party of the second part that they will WARRANT SPECIALLY the title to the property hereby conveyed, with the exception of the 1937 taxes, which the said party of the second part is to pay

WITNESS the following signatures and seals.

W. H. O'Dell (SEAL)
Minerva E. O'Dell (SEAL)

(STAMPED .50¢)

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

I, Laura J. Coyle, a Notary Public of the said County of Kanawha and State aforesaid, do hereby certify that W. H. O'Dell and Minerva E. O'Dell, his wife, whose names are signed to the above bearing date the 8th day of February, 1937, have this day acknowledged the same before me in my said County.

GIVEN under my hand this 8th day of February, 1937.
My commission expires on the 3rd day of October, 1944.

Laura J. Coyle
Notary Public

West Virginia Kanawha County Court Clerk's Office. MAR 19 1937
This Deed was this day presented to me in my office, and thereupon, together with the certificate thereto annexed, is admitted to record.

Teste:
PAUL E. WEHRLE Clerk
Paul E. Wehrle Clerk
Kanawha County Court.

PLAINTIFF'S EXHIBIT No. 3
STIPULATION OF PARTIES FILED JULY 9, 1971,
CIRCUIT COURT,
KANAWHA COUNTY, WEST VIRGINIA

H. C. PEARSON, JR. p4218 PT 11:10 a.m.
TO
CeCLE C. PEARSON

THIS DEED, Made this 20th day of February, 1939, by and between H. C. Pearson, Jr., single, party of the first part, and Cecle C. Pearson, party of the second part.

WITNESSETH: That for and in consideration of Ten Dollars ($10.00) and other valuable considerations paid by the party of the second part to the party of the first part, receipt whereof is hereby acknowledged, the party of the first part hereby grants, conveys, assigns and sells unto the party of the second part, with covenants of special warranty, the

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interests of the party of the first part in lands in Kanawha County, West Virginia, acquired under the following conveyances:

First, deed bearing date the 30th day of February, 1937, from H. C. Pearson and Cecle G. Pearson, his wife, to the party of the first part, recorded in the office of the Clerk of the County Court of Kanawha County, West Virginia, in Deed Book 438, page 499. By said deed the said party of the first part acquired an undivided one-fourth (1/4) interest in all the oil and gas under two tracts of land in Poca District, one containing 41.34 acres, more or less, known as the D. F. Legg tract, and the other containing 31.5 acres, more or less, known as the W. M. Dixon tract, both situate on Broadtree Run of Grapevine Creek; subject to the lease thereon for oil and gas, and the consolidation agreement with S. A. Griffith; being the same property conveyed unto H. C. Pearson by William O. Ziebold and wife, by deed dated May 21, 1934, of record in the office aforesaid in Deed Book 414, page 314, being tracts Nos. 2 and 3 described in said last named deed.

Second, by deed bearing date the 6th day of February, 1937, from W. H. O'Dell and Minerva E. O'Dell, his wife, to H. C. Pearson, Jr., recorded in the office aforesaid in Deed Book 434, page 53. By said deed the said party of the first part acquired one-fourth (1/4) of all the oil and gas and gasoline, and oil and gas substances, in and underlying that certain tract of land in Union District, Kanawha County, West Virginia, containing 68 acres, more or less, being the same property conveyed to said W. H. O'Dell by Sarah A. Hull and husband, by deed bearing date the 31st day of January, 1937, recorded in the office aforesaid, together with all rights and privileges therein and thereby conveyed.

Reference is made to the deeds herein referred to for more particular description of the rights and property herein and hereby conveyed and the reservations, if any, subject to which said conveyances are made.

WITNESS the following signature and seal:

(STAMPED $1.00) H. C. Pearson Jr. (SEAL)

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, TO-WIT:

I, Roy Daubenspeck, a notary public of said county, do certify that H. C. Pearson, Jr., single, whose name is signed to the foregoing writing, bearing date the 30th day of February, 1937, has this day acknowledged the same before me in my said county.

Given under my hand this 6th day of Aug. 1937.

Roy Daubenspeck
NOT RIAL SEAL Notary Public

My commission expires Sept. 14, 1944.

West Virginia Kanawha County Court Clerk's Office AUG 9 1937
This Deed was this day presented to me in my office, and thereupon, together with the Certificate thereto annexed, is admitted to record.

Test: Paul E. Yokely Clerk
Kanawha County Court

Plaintiff's Exhibit No. 3 Page 159-A

PLAINTIFF'S EXHIBIT NO. 10
STIPULATION OF PARTIES FILED JULY 9, 1971, CIRCUIT COURT, KANAWHA COUNTY, WEST VIRGINIA

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA, by William B. Maxwell, Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia,

Plaintiff

vs. Civil Action No. 6152

L. (LEMUEL) A. WHITTINGTON, HERBERT S. YOUNG, J. G. ANDERSON, SALLIE S. ANDERSON, JAMES (S.) BAILEY, ERNEST E. ADKINS, RUTH L. ADKINS, M. V. BOWER, PAUL L. GIZER, NEDA G. FIZER, K. (KEITH) L. BRICK, WANDA (N.) BRICK, BROTHERTON ENTERPRISES, INC., a corporation, ALFRED BROWN, NELLIE BROWN, C. C. CADLE, PATRA CADLE, H. C. PEARSON, JR., W. H. PEDEN, MARY W. WEST, and all unknown parties and claimants who have or claim an interest in the lands included and proceeded against in this action,

FILED
In Kanawha Circuit Court
Clerk's Office
JAN 3 - 1972
Lewis A. Fletcher
Clerk

Defendants

COMPLAINT

TO THE HONORABLE FRANK L. TAYLOR, JUDGE OF SAID COURT:

The plaintiff, State of West Virginia, complains and says:

1. William B. Maxwell, an attorney, duly licensed to practice law in the State of West Virginia, and residing and practicing in Kanawha County of said State, is the duly appointed, qualified and acting Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, having been appointed by the Auditor of the State of West Virginia and entered into and executed bond as provided by law and required by the Auditor and as such, is duly authorized and empowered to institute this action in the name of the State of West Virginia.

2. The Auditor, as State Commissioner of Forfeited and Delinquent Lands, has prepared and has certified to this Honorable Court, under date of June 30, 1965, in the form and manner and within the time prescribed by law, to be proceeded against as provided by law, a list of all lands situate in Kanawha County, West Virginia, which, on the date of the certification thereof were known to be forfeited to the State of West Virginia for non-entry on the land books of said County or were sold to said State for the delinquent taxes due thereon, and which were not redeemed, released, transferred or otherwise disposed of, and which had become irredeemable and subject to sale for the benefit of the school fund, as provided by Article 4, Chapter 11A, of the Code of West Virginia, as last amended. No waste and unappropriated or escheated lands are included in said certified list. Said list was made in quadruplicate, contains all of the information required by law, and in all respects complies with the requirements of the statutes relating thereto. The original of said list was retained by the Auditor and a copy thereof was delivered by the Auditor to, and duly received by, each of the persons required by law to have and receive the same, including the Clerk of this Court, and said Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County.

The list so certified to the Clerk of this Court, as aforesaid, is asked to be taken and considered as exhibited herewith and as a part of this complaint, as provided by law, to the same extent and with like effect as if said list were fully set out herein. For convenience, the term "Auditor" wherever used herein shall refer to the Auditor of the State of West Virginia in his capacity as State Commissioner of Forfeited and Delinquent Lands, and the term "State" shall refer to the State of West Virginia.

3. The several lots, tracts and parcels of land, and interests in land, which are proceeded against in this action, and which are hereinafter described, were certified by the Auditor to this Honorable Court by the aforesaid list, and, except as hereinafter set out in the list of lands included in this action, each lot, tract and parcel of land, and interest in land, certified as aforesaid and herein proceeded against, has become irredeemable and is subject to sale for the benefit of the school fund as provided by Article 4, Chapter 11A, of the Code of West Virginia, as last amended.

4. Each lot, tract, and parcel of land, and interest in land, herein sought to be sold for the benefit of the school fund, which was certified to this Honorable Court by the aforesaid list as having been sold to the State for delinquent taxes due thereon was duly and regularly entered upon the proper land books of Kanawha County, West Virginia, and charged with taxes in the year or years for which the same was sold, in the name of the person or persons named in said certified list under the heading, "Name in which sold or forfeited," and the taxes so charged were not paid, nor was any part thereof paid, on any of said lots, tracts, and parcels of land, or interests in land, or on any part thereof, by any person or persons; and each said lot, tract and

parcel of land, or interest in land, herein sought to be sold was returned delinquent by the Sheriff of said County for the nonpayment of taxes thereon, was not redeemed, and was sold by said Sheriff and purchased by the State for the delinquent taxes due thereon. The lots, tracts and parcels of land, and interests in land, which were returned delinquent and thereafter sold and purchased by the State are designated as such in said certified list by an "x" mark set out in each item of delinquent land included in said list in front of the heading, "Sold State tax year" or "Sold to State for tax year", and the year or years for which each lot and tract, or undivided interest therein, was returned delinquent for the nonpayment of taxes thereon and sold to the State is set out in each item of delinquent land included in said list, immediately following the said heading, "Sold State tax year" or "Sold to State for tax year".

5. Each lot, tract and parcel of land, and interest in land, herein sought to be sold which was certified to this Honorable Court by the aforesaid list as forfeited to the State for nonentry on the land books of said County was so forfeited pursuant to Section 6, Article XIII of the Constitution of this State, in the name of the person or persons named in said certified list under the heading, "Name in which sold or forfeited". The lots, tracts and parcels of land, and interests in land, which were so forfeited to the State are designated as such in said certified list by an "x" mark set out in each item of forfeited land included in said list in front of the heading, "Forfeited tax years" or "Forfeited to State tax years", and the first and last years of continuous nonentry for which each lot and tract, or undivided interest therein, was so forfeited to the State are set out in each item of forfeited land immediately following the said heading, "Forfeited tax years" or "Forfeited to State for tax years".

The term, "Name in which sold or forfeited", as used in said certified list, is synonymous with the term, "Former owner", and is a contraction of the phrase, "The former owner in whose name the land was forfeited, or was returned delinquent and sold".

6. The lands and interests in lands herein sought to be sold which were purchased by the State for the delinquent taxes due thereon were sold to the State at least eighteen months next prior to the date of the certification thereof, were not redeemed from said Auditor at any time within eighteen months after such sale as provided by law, and said lands and interests in lands were, on the date of the certification thereof, and are now, irredeemable, not redeemed, released or otherwise disposed of, and title thereto remains, and is vested absolutely, in the State; and the lands and interests in lands herein sought to be sold which were forfeited to the State for nonentry on the land books were not redeemed from said Auditor at any time prior to the certification thereof to this Honorable Court, as provided by law, and said lands and interests in lands were, on the date of the certification thereof, and are now, irredeemable, not redeemed, released or otherwise disposed of and title thereto remains, and is vested absolutely, in the State.

7. The taxes due on the respective lots, tracts and parcels of land, and interests in land, herein sought to be sold, have not been paid for any ten (10) consecutive years since the sale or forfeiture thereof to the State, nor has any lot, tract or parcel of land, or interest in land, or any part thereof, herein sought to be sold, been transferred and taxes paid thereon as provided by Section 3, Article XIII of the Constitution of this State.

8. Each undivided interest in land herein sought to be sold was, in the year or years for which the same was sold or for-

feited to the State, severed from the whole of the estate or estates from which the same was derived, and none of said undivided interests, or any part thereof, or interest therein, were, in the year or years for which the same were sold or forfeited to the State, entered and charged with taxes upon the land books along with the other estate or estates in the land as an entirety; nor have any of the undivided interests herein sought to be sold been entered on the land books and back taxed, or redeemed, as provided by Section 9, Article 4, Chapter 11, of the official Code of West Virginia.

9. Except as hereinafter set out in the list of lands herein proceeded against, all land included in this action is, as certified to this Honorable Court by the Auditor, subject to sale for the benefit of the school fund. The respective lots, tracts and parcels of land, and interests in land, so certified which are included in this action are shown and described in the list of lands next hereinafter set out, which list sets out as to each item included therein, as required by law, the certification number of each item; the year in which each item was certified to this Court; whether the lots, tracts and parcels of land, or interests in land, included in each item were sold to the State for delinquent taxes due thereon or were forfeited to the State for nonentry on the land books; the respective years of nonentry and forfeiture or delinquency and sale of each item; the name of the former owner or owners of the real estate included in each item, and, when possible, a reference to the former owner's source of title to said real estate; the names of all persons, if any, who, to the knowledge of said Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, have or claim an interest in the lands included in each item, together with a brief recital of the nature of such claim

if the same be known to said Deputy Commissioner; the quantity, location and general description of the real estate included in each item; the total amount due on each item; and, following the description of any lot, tract or parcel of land, or interest in land, set out in the following list, which is not subject to sale for the benefit of the school fund is a brief recital of the reason the same is not subject to sale.

The lands herein proceeded against are set out and described in the following list which consists of items numbered 1 to 25 , both inclusive, to-wit:

Item No. 23.

Certification No. 9504 — District: Union

Year Certified: 19 64 — Municipality: _____

Class: Land returned delinquent and sold to the State.

Sold to State for tax year: 1961

Year of sale to State: 19 62

Former owner in whose name the land was returned delinquent and sold to the State: _____

H. C. Pearson, Jr.

Other known parties or claimants:	Nature of respective claims of other known parties or claimants:

Quantity, location and description:

68 Acres, 1/8 Acre oil and gas interest, Waters Martins Branch, Union District, Kanawha County, West Virginia, being the same property conveyed to H. C. Pearson, Jr. by W. H. O'Dell and Minerva E. O'Dell, his wife, by deed dated February 8, 1937, and of record in the office of the Clerk of the County Court of Kanawha County, West Virginia, in Deed Book 428, at page 53, reference to which deed is here made for a more particular description of said property.

Former owner's source of title:

Charges:

Amount of taxes and interest due	$ 9.47
Publication Sheriff's Sale	6.00
Auditor's Certification Fee	1.00
Circuit Clerk's Fee	1.00
Deputy Commissioner's Attorney Fee	10.00
Deputy Commissioner's Commission*	
Publications*	
Total amount due as of date of filing of Complaint exclusive of Deputy Commissioner's commission and publication costs	$ 27.47

10. There may be unknown parties who have or claim an interest in the several lots, tracts and parcels of land, and interests in land, herein proceeded against and hereinabove set out and described.

11. Each of the persons entitled to notice of the institution of this action has been made a party defendant hereto, including the former owner or owners in whose name the respective lots, tracts and parcels of land, and interests in land, herein proceeded against were forfeited or were returned delinquent and sold to the State, and all unknown claimants of any interest in said lands, as well as all other persons, if any, who, according to the knowledge of the Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, have or claim an interest in any of the lands, and interests in land, included in this action; and said Deputy Commissioner knows of no other person or persons who have or claim any interest in the lands and interests in land herein proceeded against other than those named as parties defendant hereto.

12. All lists, notices, returns, certificates, sales, reports, verifications and things of any nature required by law to be made or done by any officer of Kanawha County or the State of West Virginia, including the Auditor of this State as ex officio State Commissioner of Forfeited and Delinquent Lands and the Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, requisite to the vesting of irredeemable title to the lands, and interests in land, herein proceeded against in the State of West Virginia, and to render said lands subject to sale for the benefit of the school fund, as provided by Article 4, Chapter 11A, of the Code of West Virginia, as last amended, were made or done in the manner, and at the times, and in all respects, as required by law.

13. The several deeds and other instruments of title hereinbefore referred to in the several descriptions of the lands, and interests in land, herein proceeds against are of record in the office of the Clerk of the County Court of said Kanawha County, and each of the same is asked to be taken and considered as a part hereof and as exhibited herewith.

Wherefore the plaintiff prays:

(1) That all parties named as defendants in the caption of this complaint be made parties defendant to this action.

(2) That all unknown parties and claimants who are or may be interested in any of the lands, and interests in land, herein proceeded against, or any part thereof, or interest therein, may be made parties defendant to this action; and that all right, title and interest of all unknown parties and claimants who fail to appear and defend their rights shall be forever foreclosed and held for naught.

(3) That an order of publication may be awarded and completed as to all named defendants and all unknown parties and claimants who are or may be interested in any of the lands, and interests in land, proceeded against herein.

(4) That a discreet and competent attorney at law practicing at the bar of this Court be appointed guardian ad litem for any and all infant defendants proceeded against herein whether known or unknown.

(5) That the Court may, upon proper application being made, permit the redemption of all or part of any lot, tract or parcel of land herein proceeded against, or any interest therein upon payment to the Sheriff of the total amount of taxes, interest, charges and costs properly due or chargeable thereon, as provided by Section 18, Article 4, Chapter 11A of the Code of West Virginia, as last amended.

(6) That the Court may, upon proper application being made, and whenever the facts constitute proper grounds therefor, permit the dismissal of this action as to any lot, tract or parcel of land, or interest in land, herein proceeded against, pursuant to the provisions of Section 13, Article 4, Chapter 11A of the Code of West Virginia, as last amended.

(7) That it be found and adjudged by the Court that each lot, tract and parcel of land, and interest in land, herein proceeded against, except those which may be previously redeemed or dismissed from this action, is irredeemable; that title thereto remains, and is vested absolutely, in the State of West Virginia; and that each said lot, tract and parcel of land, and interest in land, is subject to sale for the benefit of the school fund.

(8) That an order be entered herein authorizing and directing that each lot, tract and parcel of land, and interest in land, herein proceeded against, except those which may be redeemed or dismissed from this action, be sold for the benefit of the school fund, as required by the Constitution of this State.

(9) That an order of reference may be made to a Commissioner of this Court as to any of the lands, or interests in land, proceeded against in this action whenever the Court is of the opinion that an order of reference is necessary and proper.

(10) That the proceeds received from the redemption and sale of the lands, or interests in land, herein proceeded against be disbursed as provided by law, and that the rights of the respective defendants in and to any excess proceeds remaining of the purchase money received from the sale of any of the lands, or interests in land, proceeded against in this action may be adjudicated and determined upon proper application being made therefor.

(11) That the plaintiff may have such other, further and general relief as the nature of this cause may require and as to the Court shall seem proper.

STATE OF WEST VIRGINIA

By William B. Maxwell
Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia

1001 Kanawha Banking and Trust Building
Charleston, West Virginia

PLAINTIFF'S EXHIBIT NO. 11
STIPULATION OF PARTIES FILED JULY 9, 1971, CIRCUIT COURT, KANAWHA COUNTY, WEST VIRGINIA

ORDER OF PUBLICATION

STATE OF WEST VIRGINIA, by William B. Maxwell, Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia,

Plaintiff

vs.

Civil Action No. 6152

L. (LEMUEL) A. WHITTINGTON, HERBERT S. YOUNG, J. G. ANDERSON, SALLIE S. ANDERSON, JAMES (S.) BAILEY, ERNEST E. ADKINS, RUTH L. ADKINS, M. V. BOWER, PAUL L. FIZER, NEDA G. FIZER, K. (KEITH) L. BRICK, WANDA (N.) BRICK, BROTHERTON ENTERPRISES, INC., a corporation, ALFRED BROWN, NELLIE BROWN, C. C. CADLE, PATRA CADLE, H. C. PEARSON, JR., W. H. PEDEN, MARY W. WEST, and all unknown parties and claimants who have or claim an interest in the lands included and proceeded against in this action,

Defendants

FILED
In Kanawha Circuit Court
Clerk's Office
JAN 3 1968
Lewis A. Hatcher

The object of the abovesentitled action is to obtain a judgment of the Circuit Court of Kanawha County ordering the sale, for the benefit of the school fund, of all lands included in the action, and for general relief. The following is a list of all, such lands, setting forth as to each item its local description, the former owner or owners in whose name or names the land was forfeited, or was returned delinquent and sold to the State, and the names of such other defendants as may be interested in said lands:

Certification Number	Name of Former Owner in whose name the land was forfeited or was returned delinquent and sold, as the case may be	Names of such other defendants as may be interested	Local Description
9772	L. (Lemuel) A. Whittington	Herbert S. Young	50 Acres, 3/4 Acres, more or less, coal interest, Coopers Creek, Poca District
9773	L. (Lemuel) A. Whittington		1/2 coal interest. 43-3/4 Acres Tuppers Creek, Poca District
9774	L. A. Whittington		1/2 mineral interest, 6 acres, Right Hand Fork of Poca, Poca District
9775	L. A. Whittington		1/2 mineral interest 116-1/2 Acres Camp Creek, Poca District
9776	L. A. Whittington		20 acres mineral interest Grapevine Creek, Poca District
9777	L. A. Whittington		1/4 mineral interest, 52-1/10 Acres Allen Fork, Poca District
9778	L. A. Whittington		1/8 mineral interest 85 Acres Right Hand Fork Poca, Poca District
9779	J. G. Anderson	Sallie S.Anderson	53 Acres, 1/2 mineral interest Kanawha Two Mile Creek, Union District
9780	James (S.) Bailey	Ernest E. Adkins Ruth L. Adkins	2 Acres surface Kanawha Two Mile Creek, Lot 1, Union District
9781	M. V. Bover	Paul L. Fizer Neda G. Fizer	Surface Lot 1 Bover Addition, Tuppers Creek Union District
9782	K. (Keith) L. Brick Wanda (N.) Brick		Part Lot 16 Crosslanes Estate, Union District
9783	K. L. Brick Wanda Brick		Property described as Lot 17, Part Lot 16, Tract 2 Crosslanes, but being actually only Lot 17, Union District
9784	Brotherton Enterprises, Inc.		Lots 139-140 DuPont Place, Union District
9785	Brotherton Enterprises, Inc.		1/8 mineral interest, 125 acres 2 Mile Creek, Union District
9786	Brotherton Enterprises, Inc.		Lot 51 Walker Addition Institute, Union District

Certification Number	Name of Former Owner in whose name the land was forfeited or was returned delinquent and sold, as the case may be	Names of such other defendants as may be interested	Local Description
9787	Brotherton Enterprises, Inc.		Lot 151 Washington Place, Union District
9788	Brotherton Enterprises, Inc.		Lot 50 Walker Addition, Institute, Union District
9789	Brotherton Enterprises, Inc.		Lot 135 Nitro Park, Union District
9790	Brotherton Enterprises, Inc.		Lot 69 Nitro Park, Union District
9791	Brotherton Enterprises, Inc.		Lot 4 Fairview Addition, Union District
9792	Alfred Brown Nellie Brown		Lot 14, Block 3 Gore Addition, Union District
9793	C. C. Cadle Patra Cadle		4/5 Acre, more or less, Rocky Fork Rust Farm, Union District
9504	H. C. Pearson, Jr.		68 acres, 1/8 oil and gas interest, Waters Martins Branch, Union District
9505	W. M. Peden		2 Acres Coal. Martins Branch, Union District
9514	Mary W. West		Part Lots 100-101 Nitro Park Addition, Union District

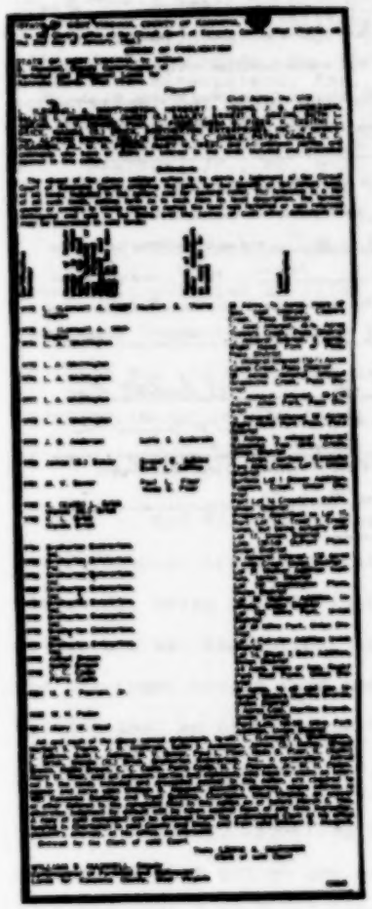
All and each of the above named defendants, to-wit: L. (Lemuel) A. Whittington, Herbert S. Young, J. G. Anderson, Sallie S. Anderson, James (S.) Bailey, Ernest E. Adkins, Ruth L. Adkins, M. V. Bower, Paul L. Fizer, Neda G. Fizer, K. (Keith) L. Brick, Wanda (N.) Brick, Brotherton Enterprises, Inc., a corporation, Alfred Brown, Nellie Brown, C. C. Cadle, Patra Cadle, H. C. Pearson, Jr., W. H. Peden, Mary W. West, and all unknown parties and claimants who have or claim an interest in the lands included and proceeded against in this action, are required to appear and serve upon William B. Maxwell, plaintiff's attorney, whose address is 1001 Kanawha Banking and Trust Building, Charleston, West Virginia, an answer or other defense to the complaint filed in this action on or before March 8, 1966, otherwise judgment by default will be taken against them at any time thereafter. A copy of said complaint can be obtained from the undersigned Clerk at his office located in Charleston in said County and State, and from said William B. Maxwell, plaintiff's attorney, at his office, as aforesaid.

Entered by the Clerk of said Court.

Teste _____
Clerk of said Court

WILLIAM B. MAXWELL, Deputy
Commissioner of Forfeited and
Delinquent Lands for Kanawha
County, West Virginia

Plaintiff's Exhibit No. 12
STIPULATION OF PARTIES FILED JULY 9, 1971, CIRCUIT COURT, KANAWHA COUNTY, WEST VIRGINIA



Affidavit of Publication

No. _____

STATE OF WEST VIRGINIA,
Kanawha County, to-wit:

I, _____, Circulation No. 64S2

☐ Sunday Gazette-Mail ☐ Charleston Gazette, a daily Democratic newspaper ☑ Daily Mail, a daily Republican newspaper, published in the City of Charleston, Kanawha County, West Virginia, do solemnly swear that the annexed notice of _____

was duly published in said paper once a _____ for three successive _____ commencing with the issue of the 5 day of February, 19 66, and ending with the issue of the 20 day of February, 19 66, and was posted at the front door of the Court House of said Kanawha County, West Virginia, on the 5 day of February, 19 66

Dates Published
February 5, 12, 19, 1966

Charlotte Cox

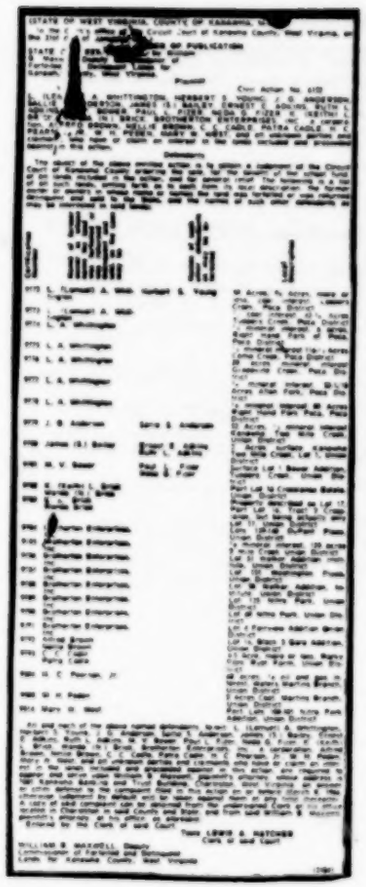
Subscribed and sworn to before me this 19 day of Feb., 19 66

Thomas J. Cadle
Notary Public of Kanawha County, West Virginia

My Commission expires Jan. 31, 1966

Printer's Fee $ 12.60

PLAINTIFF'S EXHIBIT NO. 13
STIPULATION OF PARTIES FILED JULY 9, 1971, CIRCUIT COURT, KANAWHA COUNTY, WEST VIRGINIA



Affidavit of Publication

STATE OF WEST VIRGINIA } ss. No. _____

I, Charlotte Cox of the Civil Action No. 6152

☐ Sunday Gazette-Mail ☒ Charleston Gazette, a daily Democratic newspaper ☐ Daily Mail, a daily Republican newspaper, published in the City of Charleston, Kanawha County, West Virginia, do solemnly swear that the annexed notice of Civil Action # 6152

was duly published in said paper once a week for three successive weeks commencing with the issue of the 5 day of February, 19 66, and ending with the issue of the 19 day of February, 19 66, and was posted at the front door of the Court House of said Kanawha County, West Virginia, on the 5 day of February, 19 66

Dates Published:

February 5, 12, 19, 1966 C Charlotte Cox

Subscribed and sworn to before me this 19 day of Feb. 19 66

Norman Reckard

Notary Public of Kanawha County, West Virginia

My Commission expires May 11, 1966

Printer's Fee $ 129.68

PLAINTIFF'S EXHIBIT NO. 14
STIPULATION OF PARTIES FILED JULY 9, 1971, CIRCUIT COURT, KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA, by William B. Maxwell, Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia

vs. Civil Action No. 6152

L. (LEMUEL) A. WHITTINGTON, ET AL (L. (Lemuel) A. Whittington, Nos. 9772 and 9773; L. A. Whittington, Nos. 9774, 9775, 9776, 9777 and 9778; J. G. Anderson, No. 9779; Brotherton Enterprises, Inc., a corporation, No. 9785; Alfred Brown and Nellie Brown, No. 9792; C. C. Cadle and Patra Cadle, No. 9793; H. C. Pearson, Jr., No. 9504 and W. H. Peden, No. 9505).

ENTERED IN ORDER BOOK 102 APR 1 1966 NO. 14 PAGE 304

This action came on this day for hearing, and Charles M. Love, III, guardian ad litem, appeared in open Court and tendered and asked leave to file his joint and separate answer as guardian ad litem for all known and unknown infants, if any, who may be interested in any of the lands included in this action, and the answer of said infants by their said guardian ad litem;

And William B. Maxwell, Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia, attorney for plaintiff, being present in Court and joining said guardian ad litem's motion and waiving notice thereof, no other party requiring notice, and the Court having seen and inspected said answer and being of the opinion that no other party requires service thereof, or notice of the entry of this order, the same is ordered filed.

And it appearing to the Court that the lands proceeded against in this action and described in the complaint and in the Auditor's certified lists as Certification Numbers 9780, 9782, 9783, 9784, 9786, 9787, 9788, 9789, 9790 and 9791 have heretofore been redeemed by orders duly made and entered by the Court in this action; and that the land described in said complaint and said certified lists as Certification Numbers 9781 and 9514 have been dismissed from this

action for good and proper cause, by orders duly made and entered by the Court in this action; and it further appearing to the Court, and the Court being of the opinion from the complaint, the Auditor's certified lists and the evidence adduced at the bar of the Court that the remainder of the lands proceeded against in this action and described in the complaint and in said certified lists as Certification Numbers 9772, 9773, 9774, 9775, 9776, 9777, 9778, 9779, 9785, 9792, 9793, 9504 and 9505 have not been redeemed, released, transferred or otherwise disposed of and that title thereto remains and is vested absolutely in the State, and that said lands are, as certified by the Auditor to this Court, and, as alleged in the complaint, subject to sale for the benefit of the school fund, as provided by Articles 3 and 4 of Chapter 11A of the Code of West Virginia, as last amended, it is, accordingly, ADJUDGED and ORDERED as follows:

(1) That the following described tracts and parcels of land, or undivided interests therein, have not been redeemed, released, transferred or otherwise disposed of and title thereto remains and is vested absolutely in the State of West Virginia, and that each of said tracts and parcels of land, or undivided interests therein, are, as certified by the Auditor to this Court, and, as alleged in the complaint, subject to sale for the benefit of the school fund, as provided by Articles 3 and 4 of Chapter 11A of the Code of West Virginia, as last amended, to-wit:

1. Certification Number 9772, described as follows:

   50 Acres, 3/4 acres, more or less, coal interest, Coopers Creek, Poca District, Kanawha County, West Virginia, being the same coal interest conveyed to Lemuel W. Whittington and Herbert S. Young, by Nurley P. Unrue and Walter W. Unrue, her husband, by deed dated May 10, 1948, and of record in the office of the Clerk of the County Court of Kanawha County, West Virginia, in Deed Book 832, at page 94.

2. Certification Number 9773, described as follows:

   1/2 coal interest, 43-3/4 Acres Tuppers Creek, Poca District, Kanawha County, West Virginia, being the same coal interest conveyed to Lemuel A. Whittington, by William A. Carpenter and Nacil B. Carpenter, his wife, by deed dated October 9, 1951, and of record in the office of the Clerk of the County Court of Kanawha County, West Virginia, in Deed Book 1028, at page 286.

3. Certification Number 9774, described as follows:

   1/2 mineral interest 6 acres, right hand fork of Poca, Poca District, Kanawha County, West Virginia, being the same property conveyed to L. A. Whittington by J. Hornor Davis, 2nd, Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia, by deed dated October 1, 1958, and of record in the office of the Clerk of the County Court of Kanawha County, West Virginia, in Deed Book 1258, at page 29.

4. Certification Number 9775, described as follows:

   1/2 mineral interest 116-1/2 acres, Camp Creek, Poca District, Kanawha County, West Virginia, being the same property conveyed to L. A. Whittington by J. Hornor Davis, 2nd, Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia, by deed dated October 1, 1958, and of record in the office of the Clerk of the County Court of Kanawha County, West Virginia, in Deed Book 1258, at page 22.

5. Certification Number 9776, described as follows:

   20 acres mineral interest Grapevine Creek, Poca District, Kanawha County, West Virginia, beingthe same property conveyed to L. A. Whittington by J. Hornor Davis, 2nd, Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia, by deed dated October 1, 1958, and of record in the office of the Clerk of the County Court of Kanawha County, West Virginia, in Deed Book 1258, at page 23.

6. Certification Number 9777, described as follows:

   1/4 mineral interest 52-1/10 acres Allen Fork, Poca District, Kanawha County, West Virginia, being the same property conveyed to L. A. Whittington by J. Hornor Davis, 2nd, Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia, by deed dated October 1, 1958, and of record in the office of the Clerk of the County Court of Kanawha County, West Virginia, in Deed Book 1258, at page 21.

7. Certification Number 9778, described as follows:

1/8 mineral interest 85 Acres Right Hand Fork Poca, Poca District, Kanawha County, West Virginia, being the same property conveyed to L. A. Whittington by J. Hornor Davis, 2nd, Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia, by deed dated October 1, 1958, and of record in the office of the Clerk of the County Court of Kanawha County, West Virginia, in Deed Book 1258, at page 24.

8. Certification Number 9779, described as follows:

53 Acres, 1/2 mineral interest Kanawha Two Mile Creek, Union District, Kanawha County, West Virginia, being part of the property conveyed to J. G. Anderson and Virginia I. Anderson, his wife, by Kelley Cavender and Edith Cavender, his wife, by deed dated October 12, 1932, and of record in the office of the Clerk of the County Court of Kanawha County, West Virginia, in Deed Book 382, at page 297.

9. Certification Number 9785, described as follows:

1/8 mineral interest, 125 acres 2 Mile Creek, Union District, Kanawha County, West Virginia, being the same property conveyed to Brotherton Enterprises, Inc., a corporation, by J. Hornor Davis, 2nd, Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia, by deed dated January 24, 1951, and of record in the office of the Clerk of the County Court of Kanawha County, West Virginia, in Deed Book 944, at page 453.

10. Certification Number 9792, described as follows:

Lot 14, Block 3 Gore Addition, Union District, Kanawha County, West Virginia, being the same property conveyed to Alfred Brown and Nellie Brown, his wife, by Leroy Bryan, single, by deed dated August 14, 1951, and of record in the office of the Clerk of the County Court of Kanawha County, West Virginia, in Deed Book 971, at page 296.

11. Certification Number 9793, described as follows:

4/5 Acre, more or less, Rocky Fork Rust Farm, Union District, Kanawha County, West Virginia, being the unconveyed residue of a tract of 1.9 acres conveyed to C. C. Cadle by Beulah Rust Thomas, unmarried, by deed dated January 22, 1946, and of record in the office of the Clerk of the County Court of Kanawha County, West Virginia, in Deed Book 727, at page 174.

12. Certification Number 9504, described as follows:

68 Acres, 1/8 acre oil and gas interest, Waters Martins Branch, Union District, Kanawha County, West Virginia, being the same property conveyed to H. C. Pearson, Jr. by W. H. O'Dell and Minerva E. O'Dell, his wife, by deed dated February 8, 1937, and of record in the office of the Clerk of the County Court of Kanawha County, West Virginia, in Deed Book 428, at page 53.

13. Certification Number 9505, described as follows:

2 Acres Coal Martins Branch, Union District, Kanawha County, West Virginia, being the same property conveyed to W. H. Peden by J. Hornor Davis, 2nd, Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia, by deed dated October 1, 1960, and of record in the office of the Clerk of the County Court of Kanawha County, West Virginia, in Deed Book 1320, at page 29.

(2) That unless sooner redeemed or dismissed from this action, each of the above described tracts and parcels of land or undivided interests therein, shall be sold by William B. Maxwell, Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia, at public auction, at the Virginia Street, (North-Front) door of the Court House of Kanawha County, West Virginia, to the highest bidder for cash in hand at time of sale, to be paid to the Sheriff of Kanawha County, West Virginia, or to one of his deputies attending the sale, and that said sale shall begin at ten (10) o'clock a.m. on Tuesday, April 26th, 1966, and if not completed on that day, shall be continued from day to day, Sundays and holidays excepted, until all of said tracts and parcels of land, or undivided interests therein, shall have been offered for sale or shall have been redeemed or dismissed from this action; and public outcry of any continuance of such sale shall be sufficient notice thereof, and no further notice by publication or otherwise shall be required.

Before making such sale, the said Deputy Commissioner shall, beginning at least fifteen (15) days prior to the day of sale as

fixed by the Court herein, advertise the time, terms and place of sale by causing to be published, once a week for two successive weeks, a notice of said sale containing a list of all of the lands herein ordered to be sold, in The Charleston Daily Mail and in The Charleston Gazette, two newspapers of opposite politics published in Kanawha County, as provided by Section 23, Article 4, Chapter 11A of the Code of West Virginia, as last amended.

And what the said Deputy Commissioner shall do hereunder he shall report to this Court within thirty (30) days after the completion of said sale as herein provided, by filing such report with the Clerk of this Court.

Dated this 11th day of April, 1966.

Enter:

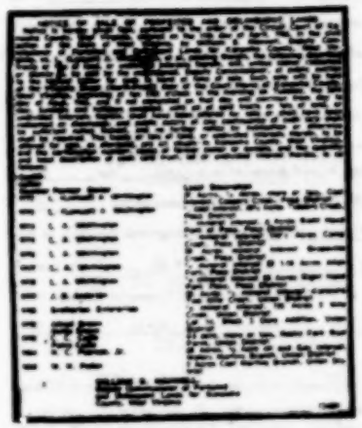
Frank L. Taylor
Judge

Approved

Charles M. Love

PLAINTIFF'S EXHIBIT NO. 15
STIPULATION OF PARTIES FILED JULY 9, 1971, CIRCUIT COURT, KANAWHA COUNTY, WEST VIRGINIA

FILED
In the Clerk's Office
APR 26 1966
Clerk
STATE OF WEST VIRGINIA



Affidavit of Publication

No. _____

Kanawha County, to-wit:

I, Charlotte Cox, Cashier, No. 6582

☐ Sunday Gazette-Mail ☐ Charleston Gazette, a daily Democratic newspaper ☑ Daily Mail, a daily Republican newspaper, published in the City of Charleston, Kanawha County, West Virginia, do solemnly swear that the annexed notice of Delinquent Lands... Whittington....

was duly published in said paper once a week for two successive weeks commencing with the issue of the 1st day of April, 1966, and ending with the issue of the 23 day of April, 1966, and was posted at the front door of the Court House of said Kanawha County, West Virginia, on the 1st day of April, 1966.

Dates Published:
April 16, 23, 1966

C. Cashier Cox

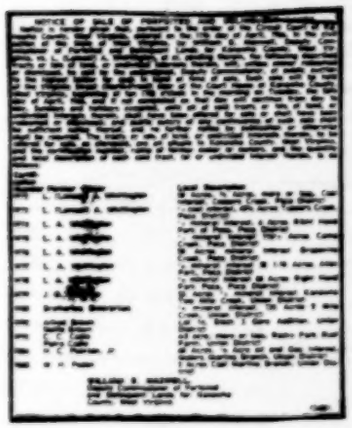
Subscribed and sworn to before me this 25 day of April, 1966

Alexander Ricketts
Notary Public of Kanawha County, West Virginia

My Commission expires May 13, 1966.

Printer's Fee $ 10.40

PLAINTIFF'S EXHIBIT NO. 16
STIPULATION OF PARTIES FILED JULY 9, 1971, CIRCUIT COURT, KANAWHA COUNTY, WEST VIRGINIA



FILED
In Kanawha Circuit Court Clerk's Office
APR 26 1966

Affidavit of Publication

No. _____

STATE OF WEST VIRGINIA,
Kanawha County, to-wit:

I, _____ of the Civil Action No. 6152

☐ Sunday Gazette-Mail ☒ Charleston Gazette, a daily Democratic newspaper ☐ Daily Mail, a daily Republican newspaper, published in the City of Charleston, Kanawha County, West Virginia, do solemnly swear that the annexed notice of Delinquent Lands... Whittington...

was duly published in said paper once a week for two successive weeks commencing with the issue of the 16 day of April, 1966, and ending with the issue of the 23 day of April, 1966, and was posted at the front door of the Court House of said Kanawha County, West Virginia, on the 16 day of April, 1966

Dates Published:
April 16, 23, 1966

Subscribed and sworn to before me this 23 day of April, 1966

Notary Public of Kanawha County, West Virginia

My Commission expires May 11, 1966

Printer's Fee $ 10.40

PLAINTIFF'S EXHIBIT NO. 17
STIPULATION OF PARTIES FILED JULY 9, 1971, CIRCUIT COURT, KANAWHA COUNTY, WEST VIRGINIA

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED
In Kanawha Circuit Court Clerk's Office
MAY 26 1966
Clerk

STATE OF WEST VIRGINIA, by William B. Maxwell, Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia,

Plaintiff

vs. Civil Action No. 6152

L. (LEMUEL) A. WHITTINGTON, ET AL,

Defendants

THE REPORT OF SALE OF WILLIAM B. MAXWELL, DEPUTY COMMISSIONER OF FORFEITED AND DELINQUENT LANDS FOR KANAWHA COUNTY, WEST VIRGINIA

TO THE HONORABLE FRANK L. TAYLOR, JUDGE OF SAID COURT:

The undersigned, William B. Maxwell, Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia, who was directed by an order entered by Your Honorable Court in the above styled civil action on the 11th day of April, 1966, to sell, unless sooner redeemed or dismissed, certain real estate described in said order, at public auction, at the Virginia Street, (North-Front) door of the Court House of Kanawha County, West Virginia, on Tuesday, the 26th day of April, 1966, to the highest bidder for cash at time of sale, respectfully reports unto Your Honor as follows:

I

That pursuant to said order of sale, the undersigned advertised the time, terms and place of sale by causing to be published, once a week for two successive weeks in The Charleston Gazette, and in The Charleston Daily Mail, two newspapers of opposite politics, published in Kanawha County, a notice of said sale, containing a list of all of the real estate ordered to be sold and setting forth as to each item its quantity, local description and

the name or names of the former owner or owners thereof, as required by said order of sale,all of which more fully and at large appear from the Certificate of Publication of each of said newspapers, which Certificates of Publication are attached hereto and made a part hereof, marked for identification "Plaintiff's Exhibit A." The undersigned further reports that the first publication of said notice of sale was made at least fifteen (15) days prior to the day of sale, as provided by law.

II

That by virtue of said order of sale, the undersigned, after having first advertised the time, terms and place of sale as required by said order offered for sale, at public auction, to the highest bidder for cash at time of sale, at the Virginia Street, (North-Front) door of the Court House of Kanawha County, West Virginia, beginning at ten (10) o'clock a.m. on Tuesday, the 26th day of April, 1966, the real estate directed to be sold by said order of sale, at which sale the following named persons became purchasers, each being the highest bidder, for the amount indicated opposite their respective names of the following real estate, to-wit:

1. Certification Number 9504, described as 68 Acres, 1/8 Acre oil and gas interest, Waters Martins Branch, Union District, Kanawha County, West Virginia.

   Purchased by W. P. Dodd for the sum of $ 30.00

   Total amount due at time of sale 42.58

   Deficit 12.58

2. Certification Number 9505, described as 2 acres, Coal Martins Branch, Union District, Kanawha County, West Virginia.

   Purchased by Consolidated Realty Co., Inc. and Stonestreet Land Co., Inc. for the sum of 1.00

   Total amount due at time of sale 49.14

   Deficit 48.14

3. Certification Number 9772, described as 50 Acres, 3/4 Acres, more or less, coal interest, Coopers Creek, Poca District, Kanawha County, West Virginia.

   Purchased by Consolidated Realty Co., Inc. and Stonestreet Lands Co., Inc. for the sum of 5.00

   Total amount due at time of sale 59.92

   Deficit 54.92

4. Certification Number 9773, described as 1/2 coal interest, 43-3/4 Acres Tuppers Creek, Poca District, Kanawha County, West Virginia.

   Purchased by Consolidated Realty Co., Inc. and Stonestreet Lands Co., Inc., for the sum of 5.00

   Total amount due at time of sale 58.42

   Deficit 53.42

5. Certification Number 9774, described as 1/2 mineral interest, 6 Acres Right Hand Fork of Poca, Poca District, Kanawha County, West Virginia.

   Purchased by Consolidated Realty Co., Inc. and Stonestreet Lands Co., Inc. for the sum of 1.00

   Total amount due at time of sale 37.50

   Deficit 36.50

6. Certification Number 9775, described as 1/2 mineral interest 116-1/2 Acres Camp Creek, Poca District, Kanawha County, West Virginia.

   Purchased by W. P. Dodd for the sum of 140.00

   Total amount due at time of sale 58.77

   Surplus 81.23

7. Certification Number 9776, described as 20 Acres mineral interest Grapevine Creek, Poca District, Kanawha County, West Virginia.

   Purchased by W. T. Young for the sum of 15.00

   Total amount due /at time of sale 38.90

   Deficit 23.90

8. Certification Number 9777, described as 1/4 mineral interest 52-1/10 Acres Allen Fork, Poca District, Kanawha County, West Virginia

Purchased by W. P. Dodd for the sum of	35.00
Total amount due at time of sale	40.90
Deficit	5.90

9. Certification Number 9778, described as 1/8 mineral interest 85 Acres Right Hand Fork Poca, Poca District, Kanawha County, West Virginia.

Purchased by W. P. Dodd for the sum of	40.00
Total amount due at time of sale	41.40
Deficit	1.40

10. Certification Number 9779, described as 53 Acres, 1/2 mineral interest Two Mile Creek, Union District, Kanawha County, West Virginia.

Purchased by Consolidated Realty Co., Inc. and Stonestreet Lands Co., Inc. for the sum of	90.00
Total amount due at time of sale	48.88
Surplus	41.12

11. Certification Number 9785, described as 1/8 mineral interest, 125 Acres 2 Mile Creek, Union District, Kanawha County, West Virginia.

Purchased by Consolidated Realty Co., Inc. and Stonestreet Lands Co., Inc. for the sum of	5.00
Total amount due at time of sale	44.27
Deficit	39.27

12. Certification Number 9792, described as Lot 14, Block 3 Gore Addition, Union District, Kanawha County, West Virginia.

Purchased by Jimmie Summers for the sum of	75.00
Total amount due at time of sale	52.27
Surplus	22.73

13. Certification Number 9793, described as 4/5 Acre, more or less, Rocky Fork Rust Farm, Union District, Kanawha County, West Virginia.

Purchased by Jimmie Summers for the sum of	20.00
Total amount due at time of sale	41.88
Deficit	21.88

III

The undersigned further reports that the total purchase money for each of the foregoing described lots and tracts, or undivided interests therein, was paid by each of the purchasers in cash at the time of sale, to the Sheriff of Kanawha County or to one of his deputies attending the sale, as required by said order of sale, and that proper receipts were issued by said Sheriff to the respective purchasers for the purchase money paid by them.

IV

The undersigned further reports that at the sale so held it was publicly announced that the State of West Virginia offered for sale, and sold, only such interest as was vested in the State at the time of sale, and that the sales were made subject to the right of the former owner, his heirs or assigns, to redeem the real estate sold at any time prior to the confirmation of the sale, and further subject to the right of the Court to order the dismissal of any of the real estate sold for any of the causes set forth in Section 25, Article 4, Chapter 11A of the Code, as amended, and to refund to the purchaser his purchase money for said real estate. It was further publicly announced at said sale that application would be made by the undersigned to Your Honorable Court for an order confirming the sales of said real estate thirty days after the day of sale or as soon thereafter as an order of confirmation could be properly entered, and that the purchasers of said real estate would have thirty days in which to apply for a refund of their purchase money as provided by said Section 25, Article 4, Chapter 11A of the Code, as amended.

V

The undersigned further reports that the sale of the foregoing described real estate was made and conducted, in all respects, in conformity to said order of sale and as provided by law; that the prices received for said real estate were the best prices obtainable therefore, and were as high as might reasonably be expected; and that, in the opinion of the undersigned, each of said sales should be confirmed.

Dated and respectfully submitted this 26th day of May, 1966.

William B. Maxwell
Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia.

PLAINTIFF'S EXHIBIT NO. 18
STIPULATION OF PARTIES FILED JULY 9, 1971, CIRCUIT COURT, KANAWHA COUNTY, WEST VIRGINIA

ENTERED
IN DK ORDER BOOK
MAY 27 1966
NO. Batch 14
PAGE Page 429

97

STATE OF WEST VIRGINIA, by William B. Maxwell, Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia

vs.

Civil Action No. 6152

L. (LEMUEL) A. WHITTINGTON, ET AL

This action came on this day for hearing upon the papers heretofore read herein, upon the former orders made herein, upon the report of William B. Maxwell, Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia, heretofore filed with the Clerk of this Court on the 26th day of May, 1966, showing what was done with respect to the lands which were directed to be sold by said Deputy Commissioner for the benefit of the school fund by an order entered by this Court in this cause on the 11th day of April, 1966. And there being no objections or exceptions to said report, and the Court perceiving no just ground for exceptions, and it appearing to the Court, and the Court being of the opinion, that said report was made and filed in conformity to said order of sale, it is ORDERED and ADJUDGED that said report be, and the same is hereby approved, ratified and confirmed.

And it appearing to the Court from said report that the real estate described in, and directed to be sold by, said order of sale, to-wit, the real estate designated in order of sale as Certification Numbers 9504, 9505, 9772, 9773, 9774, 9775, 9776, 9777, 9778, 9779, 9785, 9792 and 9793, and next hereinafter described, was sold by said Deputy Commissioner, upon the terms and subject to the conditions required by said order, to the following named purchasers for the following prices, namely:

1. Certification Number 9504, described as 68 Acres, 1/8 Acre oil and gas interest, Waters Martins Branch, Union District, Kanawha County, West Virginia, was sold to W. P. Dodd for $30.00.

2. Certification Number 9505, described as 2 acres, Coal Martins Branch, Union District, Kanawha County, West Virginia, was sold to Consolidated Realty Co., Inc. and Stonestreet Lands Co., Inc. for $1.00.

3. Certification Number 9772, described as 50 Acres, 3/4 Acres, more or less, coal interest, Coopers Creek, Poca District, Kanawha County, West Virginia, was sold to Consolidated Realty Co., Inc. and Stonestfeet Lands Co., Inc. for $5.00.

4. Certification Number 9773, described as 1/2 coal interest, 43-3/4 Acres Tuppers Creek, Poca District, Kanawha County, West Virginia, was sold to Consolidated Realty Co., Inc. and Stonestreet Lands Co., Inc. for $5.00.

5. Certification Number 9774, describeo as 1/2 mineral interest, 6 Acres Right Hand Fork of Poca, Poca District, Kanawha County, West Virginia, was sold to Consolidated Realty Co., Inc. and Stonestreet Lands Co., Inc. for $1.00.

6. Certification Number 9775, described as 1/2 mineral interest 116-1/2 Acres Camp Creek, Poca District, Ka nawha County, West Virginia, was sold to W. P. Dodd for $140.00.

7. Certification Number 9776, described as 20 Acres mineral interest Grapevine Creek, Poca District, Kanawha County, West Virginia, was sold to W. T. Young for $15.00.

8. Certification Number 9777, described as 1/4 mineral interest 52-1/10 Acres Allen Fork, Poca District, Kanawha County, West Virginia, was sold to W. P. Dodd for $35.00.

9. Certification Number 9778, described as 1/8 mineral interest 85 Acres Right Hand Fork Poca, Poca District, Kanawha County, West Virginia, was sold to W. P. Dodd for $40.00.

10. Certification Number 9779, described as 53 Acres, 1/2 mineral interest Two Mile Creek, Union District, Kanawha County, West Virginia, was sold to Consolidated Realty Co., Inc. and Stonestreet Lands Co., Inc. for $90.00.

11. Certification Number 9785, described as 1/8 mineral interest, 125 Acres 2 Mile Creek, Union District, Kanawha County, West Virginia, was sold to Consolidated Realty Co., Inc. and Stonestreet Land

Co., Inc. for $5.00.

12. Certification Number 9792, described as Lot 14, Block 3 Gore Addition, Union District, Kanawha County, West Virginia, was sold to Jimmie Summers for $75.00.

13. Certification Number 9793, described as 4/5 Acre, more or less, Rocky Fork Rust Farm, Union District, Kanawha County, West Virginia, was sold to Jimmie Summers for $20.00.

And it further appearing to the Court from said report that notice of said sale was duly published, once a week for two successive weeks, beginning at least fifteen days prior to the day of sale, in The Charleston Gazette and in The Charleston Daily Mail, two newspapers of opposite politics published in Kanawha County, and that each of the above described tracts and parcels of land, or undivided interests therein, was sold at public auction to the highest bidder for cash at time of sale, as required by said order of sale; and it further appearing to the Court, and the Court being of the opinion, that the price for which each of the above described tracts and parcels of land, or undivided interests therein, was sold, was the best price obtainable therefor and was as high as might reasonably be expected; and it further appearing to the Court, and the Court being of the opinion, that said sales were made and conducted, in all respects, in accordance with the provisions of said order of sale and as provided by law; it is further ORDERED and ADJUDGED that the sale of each of the above described tracts and parcels of land, or undivided interests therein, to the above named purchaser thereof, for the amount set out above be, and the same is hereby, approved, ratified and confirmed.

And it further appearing to the Court from said report that the purchase money for each of the above described tracts and parcels of land, or undivided interests therein, has been paid in full to the Sheriff of Kanawha County as provided by law, it is further ORDERED and ADJUDGED that the said William B. Maxwell, De-

puty Commissioner, as aforesaid, do make, execute, acknowledge, record and deliver to the respective purchasers of said real estate, their heirs or assigns, an apt and proper deed for each item of real estate so purchased by them, as aforesaid, upon the payment by the grantee or grantees in each of said deeds to said Deputy Commissioner of a fee of Five Dollars ($5.00) for each of said deeds, and to the County Clerk of Kanawha County the transfer and recording fees necessary to record each of said deeds and any assignment thereto, all as provided by Sections 31 and 32 of Article 4, Chapter 11A of the Code, as last amended.

It is further ORDERED and ADJUDGED that William B. Maxwell, Deputy Commissioner, as aforesaid, be, and he is hereby, allowed as compensation for his services, an attorney's fee of Ten Dollars ($10.00) for each item of real estate sold by him, as aforesaid, and above described, and, in addition thereto, a commission of ten per cent (10%) of the total proceeds received from the sale of said real estate; and the Sheriff of Kanawha County is hereby ordered and directed to pay said sums to said Deputy Commissioner as provided by law.

And it further appearing to the Court from said report that there is a surplus over and above the taxes, interest and costs chargeable to the real estate designated and described as Certification Numbers 9775, 9779, and 9792 to which the former owners, or the heirs or assigns of the former owners, of such real estate may be entitled, it is further ORDERED and ADJUDGED that the Sheriff of Kanawha County shall retain and hold such surplus as provided by Section 28, Article 4, Chapter 11A of the Code, as last amended, and shall disburse and distribute the balance of the proceeds received from the redemption and sale of the real estate included in this action, as provided by law.

The Court doth now certify that Charles M. Love, III,

guardian ad litem for all known and unknown infants, if any, who are or may be interested in any of the lands included in this action, was present at the bar of this Court at and during all of the hearings and proceedings in this cause, including the entry of this order.

Dated this 27th day of May, 1966.

Enter:

Frank L. Taylor
Judge

Plaintiff's Exhibit No. 19
STIPULATION OF PARTIES FILED JULY 9, 1971, CIRCUIT COURT, KANAWHA COUNTY, WEST VIRGINIA

BOOK 1467 PAGE 378

THIS DEED, made this 1st day of June, 19 66, by and between WILLIAM B. MAXWELL, Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia, acting for and on behalf of the State of West Virginia, hereinafter called Grantor, and W. P. DODD hereinafter called Grantee;

WHEREAS, in pursuance of and in accordance with the statutes in such case made and provided, and pursuant to an order of the Circuit Court of Kanawha County made and entered on the 11 day of April, 19 66, in a civil action therein pending entitled, State of West Virginia, by William B. Maxwell, Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia, vs. L. (Lemuel) A. Whittington, et al, the above named Deputy Commissioner did sell, for the benefit of the School Fund, on the 26th day of April, 19 66, according to the terms and conditions of said decree, the hereinafter described real estate to W. P. Dodd for the sum of $ 30.00, cash in hand at time of sale; and

WHEREAS, the said purchase money was paid to the Sheriff of Kanawha County, West Virginia, or to one of his deputies attending said sale, as provided by law; and

WHEREAS, the said Court by a subsequent order made in said cause on the 27th day of May, 19 66, confirmed said sale and directed a deed for said real estate to be made to said purchaser by said Deputy Commissioner;

NOW, THEREFORE, THIS DEED WITNESSETH: That for and in consideration of the premises and in pursuance of the statute, the said Grantor does hereby grant and convey unto the said Grantee the real estate so purchased at said sale, being the same real estate designated in the Auditor's Certified List and in the complaint and other proceedings in said cause as Certification Number 9504 situate in Kanawha County, West Virginia, and more particularly described as follows:

Mail to: W. P. Dodd, Rt. 1, Box 301, Elkview, West Virginia

68 Acres, 1/8 Acre oil and gas interest, Waters Martins Branch, Union District, Kanawha County, West Virginia, being the same property conveyed to H. C. Pearson, Jr. by W. H. O'Dell and Minerva E. O'Dell, his wife, by deed dated February 8, 1937, and of record in the office of the Clerk of the County Court of Kanawha County, West Virginia, in Deed Book 428, at page 53, reference to which deed is here made for a more particular description of said property.

#3960

The above described real estate is the same which was sold to the State of West Virginia in the year 19 62 for the nonpayment of taxes thereon for the year(s) 1961, ~~forfeited to the State of West Virginia for nonentry for the year 19— to 19—, both inclusive~~, in the name(s) of H. C. Pearson, Jr.

The Grantor does hereby declare that the property transferred by this document is not subject to state excise tax upon the privilege of transferring real estate for the reason that it is a transfer from the State of West Virginia.

WITNESS the following signature and seal the day and year first above written.

William B. Maxwell (SEAL)
Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

I, Geraldine D. Alexander, a Notary Public in and for said County of Kanawha, and State of West Virginia, do certify that William B. Maxwell, Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia, whose name is signed to the foregoing writing bearing date the 1st day of June, 1966, has this day acknowledged the same before me in my said County.

Given under my hand this 1st day of June, 1966.

My commission expires October 1, 1972

This instrument was prepared by William B. Maxwell. 11:19

Notary Public in and for Kanawha County, West Virginia

This instrument was presented to the Clerk of the County Court of Kanawha County, West Virginia, on JUN 28 1966 and the same is admitted to record

Teste: Paul E. Kekkele Clerk
Kanawha County Court

Plaintiff's Exhibit No. 20
STIPULATION OF PARTIES FILED JULY 9, 1971, CIRCUIT COURT, KANAWHA COUNTY, WEST VIRGINIA

53815 BOOK 145 PAGE 67

THIS AGREEMENT, Made and entered into this 27th day of December, A.D., 1957, by and between Marvin Bell and Sarah Ann Bell, his wife, Maxine B. O'Dell, Guardian for Gail, Gary and Douglas O'Dell, Marvin V. Culpepper and Carmen Elaine Culpepper, his wife, Carmen Elaine Culpepper, Guardian for Charles Wesley and Alice Lucille Culpepper, infants and Ross Culpepper and Olive O'Dell Culpepper, his wife, of Charleston, West Virginia, County of Kanawha, State of West Virginia.
parties of the first part, hereinafter called "Lessor", and UNITED FUEL GAS COMPANY, a corporation, party of the second part, hereinafter called "Lessee".

#48 Mail: United Fuel Gas Co. P. O. Box 1273, City

WITNESSETH: The Lessor, in consideration of the sum of One ($1.00) Dollar, paid by the Lessee, the receipt of which is hereby acknowledged, and of the covenants hereinafter contained, on the part of the Lessee to be paid, kept and performed, has granted, demised, leased and let and by these presents does grant, demise, lease and let, with covenants of quiet possession and sole right so to grant and demise, unto the Lessee, for the purpose of searching for, exploring, drilling and operating for and marketing oil and gas, and of storing gas of any kind regardless of the source thereof in the oil and gas strata therein including the right of injecting gas therein and removing the same therefrom together with the right to lay pipe lines, and build tanks, stations, telephone, telegraph and electric power lines, houses for gates, meters and regulators with all other rights, privileges, appliances and structures necessary, incident or convenient for the operation of this land alone and conjointly with neighboring lands, all that certain tract of land situate in Union District, Kanawha County and State of West Virginia, on the waters of Marzint Branch, bounded substantially as follows:

On the North by lands of William S. Pugh
On the East by lands of Ruby Davis
On the South by lands of James D. Kelley
On the West by lands of A.S. Bailey, et al

Containing 68 acres, more or less, but no well shall be drilled by either party, except by mutual consent, within 200 feet of the dwelling house or barn now on said premises.

IN CONSIDERATION OF THE PREMISES, the parties hereto covenant and agree:

FIRST: That this lease shall continue for a term of five years from and after the date hereof, and as much longer thereafter as said tract of land is operated by Lessee in the search for or production of oil or gas, and/or so long as the same is used for underground storage of gas and the removal thereof, either through the operation of wells on the above described tract of land or on tracts in the same storage field.

SECOND: Lessee will deliver to the owner or owners of the oil, free of cost, in the pipe line to which said Lessee may connect its wells, a royalty of the equal one-eighth (⅛) part of all oil produced and saved from the leased premises.

THIRD: For all gas produced, marketed and used off of said premises, with the exception of gas removed from a stratum known as Big Lime, in which Lessee proposes to store gas, under the terms hereof, to pay to Lessor their Proportionate Part of one-eighth of the wholesale market value thereof, at the well, based upon the usual price paid therefor in the general locality of said leased premises, payable quarterly, such payments to begin ninety days after completion of each well, and to pay Lessor for each well drilled to the said stratum known as Big Lime, in which Lessee stores gas, their Proportionate Part of the sum of $300.00 per year, payable quarterly, in advance, Lessee to have the right to install and maintain on said premises all necessary equipment and appliances and to do any and all other things as may be reasonably necessary for the purpose of utilizing said premises for the production and storage of gas, as well as the injection of gas therein and the removal of same therefrom.

In the event the emoluments provided for in Paragraphs Second and Third hereof, inuring to the owner or owners of the oil and gas underlying the above described tract of land, do not, in the aggregate, equal or exceed a sum of money equivalent to One ($1.00) Dollar per acre per year, then Lessee shall pay to such owners thereof the difference between the emoluments so received and One ($1.00) Dollar per acre per year, to the end that Lessee shall, in any event, pay to the owners of the oil and gas underlying said tract of land a minimum of One ($1.00) Dollar per acre per year, payable Annually in advance, beginning December 27, 1958.

FOURTH: If the Lessor does not have title to all the oil and gas under said premises, or if the acreage or area herein recited is in excess of the true quantity of land in said premises, the Lessor agrees, on demand made, to refund delay rentals and royalties paid and release Lessee from the payment of future rentals or royalties in proportion to the outstanding title or difference between the recited and true acreage. In case of the failure of Lessor to so refund, Lessee shall have and is here given the right to apply future rentals and/or royalties on such overpayment until the amount thereof is paid. If the recited acreage or area be found to be less than the quantity of land in said premises, Lessee, on demand made, shall pay up arrears or deficiency in rental payments on the basis of the excess of the true over the said recited acreage, and thereafter make payments under this lease on the basis of the true acreage.

FIFTH: Lessee shall have the right to abandon any well which has heretofore or may hereafter be drilled on said premises to the said storage stratum, known as Big Lime, as well also as the right of abandoning any well drilled to any other stratum which is not producing oil or gas in paying quantities. In such event, however, the owners of the oil and gas underlying said tract of land, until this lease is duly surrendered, shall be paid not less than One ($1.00) Dollar per year per acre, as provided in Paragraph Third hereof.

BEST COPY AVAILABLE

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SIXTH: Lessor hereby warrants and agrees to defend the title to the property herein leased and agrees that Lessee shall have the right at any time to redeem for Lessor, by payment, any mortgages, taxes or other liens on the above described lands, in the event of default of payment by Lessor and be subrogated to the rights of the holder thereof, and Lessor further agrees, in case of notice of any adverse claim or suit filed affecting the title to the leased premises or affecting all or any part of the emoluments hereunder, that Lessee may withhold the emoluments accruing hereunder until the ownership is determined by final decree of a court of competent jurisdiction without in anywise affecting its rights hereunder.

SEVENTH: All payments due hereunder may be made by cash or check to *Sarah Ann Null* or by deposit to ______ credit in the ______ Bank of ______ or by check made payable to *her* order and mailed to *her* at *Rt. 4 Box 52-E Charleston, Kanawha* County, State of *West Virginia* who is hereby appointed Agent of the Lessor for such purposes.

34.00 *Long*

~~EIGHTH: Regardless of whether or not any well or wells is or are drilled or utilized for the production of gas, or for the injection and/or withdrawal of gas from the storage field underlying said tract of land, Lessee agrees that the surface owner and/or owners thereof, residing on said premises, and/or the tenant who resides thereon, at the direction of such owner or owners, may use, free of charge, subject to the conditions and provisions hereinafter contained, for light and heat in one dwelling house located on said tract of land, 100,000 cubic feet of gas per year. All gas in excess of 100,000 cubic feet used in each year shall be paid for by such user at the current published local rates of the Lessee. This privilege is granted upon condition that such user shall furnish and install the necessary lines, regulators and all other equipment and appliances necessary to receive and control said gas and assume all risk in connection therewith, and ______ shall use said gas with economy through safe and suitable appliances, and shall subscribe to and be bound by the reasonable rules and regulations of the Lessee, relating to such use of gas. All connections shall be made by the Lessee at points it may select. Before making such connection, satisfactory evidence of the right and privilege to the use of free gas shall be furnished by said surface owner and/or owners to Lessee, and, in no event, shall more than one free gas privilege be granted on said tract of land, and said gas shall be exclusively used on said premises. If such user does not promptly pay for gas used in excess of said 100,000 cubic feet per year, Lessee may, if it so elects, and is hereby given the right to, apply the emoluments accruing hereunder to such user to satisfy any sums which then may be due for such excess gas. Each and all of the terms, conditions and provisions hereof, with respect to the use of free gas, shall be fully complied with and shall be considered and construed as conditions precedent to the right to use free gas.~~

NINTH: It is agreed that said Lessee is to have the privilege of using sufficient water, gas and surface rock from said premises to operate all machinery necessary for drilling and operating thereon, the plugging and abandoning of any well or wells on said premises, and at any time to remove all machinery and fixtures placed on said premises; and further, upon the payment of One ($1.00) Dollar, at any time, by said Lessee to said Lessor, or to the above named Agent, said Lessee shall have the right to surrender this lease for cancellation, after which all payments and liabilities hereunder, including said free gas privilege, shall cease and determine, and this lease become absolutely null and void. The parties hereto agree that the recordation of a deed of surrender in the proper county, and the mailing in the post office of a check payable as above provided, for said last mentioned sum and all amounts then due hereunder, shall be full surrender and termination of this lease.

TENTH: It is agreed and understood that upon the complete execution of this agreement by the owners of each and every interest therein, the same shall, in all respects, supersede and take the place of that certain other oil and gas lease on said premises, executed by ______ ______ to said party of the second part on the ______ day of ______, 19___, and recorded in the office of the Clerk of the County Court of ______ County, ______, in ______ Book ______ at page ______.

ELEVENTH: All terms, conditions, limitations and covenants between the parties hereto shall extend to their respective heirs, successors, personal representatives and assigns, but no change in the ownership of the land or assignment of the emoluments hereunder shall be binding on the Lessee until after the Lessee has been furnished with satisfactory evidence of such written transfer or assignment. The covenants herein on behalf of the Lessor are the joint and several covenants of each of the parties of the first part.

Witness the following signatures and seals the day and year first above written.

Ross Culpepper (SEAL)	*Marvin Null* (SEAL)
Alice O'Dell Culpepper (SEAL)	*Sarah Ann Null* (SEAL)
(SEAL)	*Maxine H. O'Dell, Guardian* (SEAL)
(SEAL)	*Marvin W. Culpepper* (SEAL)
(SEAL)	*Carmen Elaine Culpepper* (SEAL)
(SEAL)	*Carmen Elaine Culpepper, Gdn.* (SEAL)
(SEAL)	(SEAL)

Witness: UNITED FUEL GAS COMPANY

______ By ______ President.

STATE OF WEST VIRGINIA,
COUNTY OF *Kanawha*, to-wit:

I, *Jack D. Miller*, a *Notary Public* of said County of *Kanawha* do certify that *Marvin Null and Sarah Ann Null* ______ his wife, whose name *s are* signed to the within writing, bearing date the *27th* day of *December*, A. D. 195*7*, ha*ve* this day acknowledged the same before me in my said County.

Given under my hand this *27th* day of *December*, A. D. 195*7*

My commission expires *June 8, 1958*

Jack D. Miller
Notary Public

STATE OF WEST VIRGINIA,
COUNTY OF *Kanawha*, to-wit:

I, *Jack D. Miller*, a *Notary Public* of said County of *Kanawha* do certify that *Maxine H. O'Dell, Guardian for Mary, Neil and Douglas O'Dell, infants and Marvin W. Culpepper and Carmen Elaine Culpepper, his wife and Carmen Elaine Culpepper, Guardian for* [illegible] *infants*, whose name *s are* signed to the within writing, bearing date the *27th* day of *December*, A. D. 19*57*, ha*ve* this day acknowledged the same before me in my said County.

Given under my hand this *31st* day of *December*, A. D. 19*57*

My commission expires *June 8, 1958*

Jack D. Miller
Notary Public

STATE OF WEST VIRGINIA,
COUNTY OF *Kanawha*, to-wit:

I, *Jack D. Miller*, a *Notary Public* of said County of *Kanawha* do certify that *Ross Culpepper and Alice O'Dell Culpepper* ______ his wife, whose name *s are* signed to the within writing, bearing date the *27th* day of *December*, A. D. 195*7*, ha*ve* this day acknowledged the same before me in my said County.

Given under my hand this *2nd* day of *January*, A. D. 195*8*

My commission expires *June 8, 1958*

Jack D. Miller
Notary Public

1:50

53845

West Virginia Kanawha County Court Clerk's Office FEB 20 [illegible]
This instrument was this day presented to me in my office, and thereupon, together with the Certificate thereto annexed, is admitted to record.

Teste: *Paul E. [illegible]* Clerk
Kanawha County Court

PLAINTIFF'S EXHIBIT NO. 21
STIPULATION OF PARTIES FILED JULY 9, 1971, CIRCUIT COURT, KANAWHA COUNTY, WEST VIRGINIA

THIS AGREEMENT, Made and entered into this 17th day of February, 1967, by and between W. P. DODD and ERNESTINE DODD, his wife, parties of the first part, and UNITED FUEL GAS COMPANY, a West Virginia corporation, party of the second part,

W I T N E S S E T H:

THAT WHEREAS, by oil and gas lease agreement dated December 27, 1957, Marvin Null and Sarah Null, his wife, and Maxine H. O'Dell and others, heirs and devisees of W. H. O'Dell, deceased, leased unto the party of the second part a certain tract of land containing 66 acres, more or less, situate on the waters of Martins Branch, in Union District, Kanawha County, West Virginia, which said lease is recorded in the office of the Clerk of the County Court of Kanawha County, West Virginia, in Lease Book 145, at page 67; and,

WHEREAS, one Cecle G. Pearson owned an interest in the aforesaid tract of land, but did not join in the said lease agreement of December 27, 1957; and,

WHEREAS, by deed dated June 1, 1966, recorded in the aforesaid Clerk's office in Deed Book 1467, at page 378, William B. Maxwell, Deputy Commissioner of Forfeited and Delinquent Lands, conveyed unto W. P. Dodd, one of the parties of the first part herein, the interest formerly owned by the said Cecle G. Pearson in said tract of land; and,

WHEREAS, the parties of the first part now desire to adopt, ratify and confirm the said lease agreement of December 27, 1957.

To the aforementioned lease, deed and records reference is here made for all purposes.

NOW THEREFORE, in consideration of the sum of One Dollar ($1.00) and other considerations, cash in hand paid, the receipt of which is hereby acknowledged, the parties of the first part hereby ratify and confirm unto the party of the second part, its successors and assigns, the aforesaid lease agreement of December 27, 1957, such ratification and confirmation to be considered effective as of the 1st day of June, 1966. All payments due hereunder shall be made to W. P. Dodd, Route #1, Box 301, Elkview, W. Va. 25071.

WITNESS the following signatures and seals.

_____ (SEAL)
W. P. Dodd

_____ (SEAL)
Ernestine Dodd

STATE OF W. Va.,
COUNTY OF Kanawha, TO-WIT:

I, _____, a Notary Public of said county, do certify that W. P. DODD and ERNESTINE DODD, his wife, whose names are signed to the writing above bearing date the 17th day of February, 1967, have this day acknowledged the same before me in my said county.

Given under my hand this 17 day of April, 1967.

My commission expires July 31, 1971

_____
Notary Public

This instrument was prepared by
Joseph C. Crim, P. O. Box 1273,
Charleston, West Virginia.

This instrument was presented to the Clerk of the County Court of Kanawha County, West Virginia, on APR 3 1967 and the same is admitted to record.

Teste: Paul E. Wehrle Clerk
Kanawha County Court
53845

Lease Book 164 A true copy from the record.
Page 314 Teste: Paul E. Wehrle, Clerk,
Date 5-17-68 By _____ Kanawha County Court. Deputy

PLAINTIFF'S EXHIBIT NO. 22
STIPULATION OF PARTIES FILED JULY 9, 1971, CIRCUIT COURT, KANAWHA COUNTY, WEST VIRGINIA

53845

BOOK 169 PAGE 727

Mail: United Fuel Gas Co.
P. O. 1273, Charleston, W. Va.

THIS AGREEMENT, Made and entered into this 13 day of November, 1967, by and between Sarah Ann Hull & Marvin Hull her husband M. P. Hall & Dorothea Hall his wife

part ies of the first part, hereinafter called "Lessor", and UNITED FUEL GAS COMPANY, a corporation, party of the second part, hereinafter called "Lessee".

W I T N E S S E T H:

THAT WHEREAS, by agreement dated December 29, 1927, Marvin Hull et ux granted unto United Fuel Gas Company an oil and gas combination production and storage lease covering a tract of land containing 68 acres, more or less, situate on the waters of Martin Branch, in Union District, Kanawha County, West Virginia, and recorded in the office of the Clerk of the County Court of Kanawha County, West Virginia, in Lease Book 145, at page 68.

WHEREAS, Lessor is now the owner of the property covered by said lease; and

WHEREAS, the Lessor and Lessee, for their mutual benefit, desire to amend said lease agreement in order to facilitate the formation of drilling units for deep gas production.

NOW, THEREFORE, in consideration of the premises and the sum of One Dollar ($1.00) paid by the Lessee to Lessor, the receipt of which is hereby acknowledged, and of the covenants hereinafter contained, Lessor and Lessee hereby supplement and modify said lease as follows, to-wit:

Lessee hereby is given the right at its option, at any time from the date hereof while said lease shall be in effect and from time to time within such period, to pool the gas leasehold estate below the top of the Corniferous Lime formation in all or part of the leased premises with like leasehold estates in other lands in the vicinity thereof, to create drilling units for deep gas production of such size and surface acreage as Lessee may desire, but containing not more than 300 acres plus 10% acreage tolerance. Each unit may be created by a written declaration-notice executed by Lessee and delivered to Lessor containing a description of the unit so created. Any well which is commenced, or is drilled or is producing on any part of any lands theretofore or thereafter so pooled shall, except for the payment of royalties, be considered a well commenced, drilled, and producing on the lands covered by this lease. There shall be allocated to the portion of the leased premises included in any such pooling such proportion of the actual production from all lands so pooled as such portion of the leased premises, computed on an acreage basis, bears to the entire acreage of the lands so pooled. The production so allocated shall be considered for the purpose of payment of royalty to be the entire production from the portion of the leased premises included in such pooling in the same manner as though produced from such portion under the terms of this lease. Said option

BOOK 169 PAGE 728

may be exercised by lessee from time to time, and a unit may be formed either before or after a well has been drilled or production has been established on the leased premises or on a portion of the leased premises which is included in the unit or in other lands which are pooled therewith. Lessee shall continue to pay unto Lessor, in addition to the production royalties as aforesaid, the minimum payment of One Dollar ($1.00) per acre per year provided for in the original lease, so long as the big Lime stratum therein is utilized for the underground storage of gas.

WITNESS the following signatures and seals all as of the day and year first above written.

Sarah Ann Hull (SEAL) _____ (SEAL)
Marvin Hull (SEAL) _____ (SEAL)
M P Hall (SEAL) _____ (SEAL)
Executive Board (SEAL) _____ (SEAL)
_____ (SEAL) _____ (SEAL)

UNITED FUEL GAS COMPANY

By _____
Vice President

ATTEST:
Martin W. Bryan
Assistant Secretary

STATE OF West Virginia,
COUNTY OF Kanawha, TO-WIT:

I, Dorothy L. Martin a Notary Public of said county, do certify that Sarah Ann Hull & Marvin Hull, her husband, whose name s are signed to the writing above bearing date the 13 day of November, 1967, has/have this day acknowledged the same before me in my said county.

Given under my hand this 14 day of November, 1967.

My commission expires _____.

Dorothy L. Martin
Notary Public

D.L. Martin

BOOK 169 PAGE 729

STATE OF West Virginia,

COUNTY OF Kanawha, TO-WIT:

I, Dorsey C. Martin, a Notary Public of said county, do certify that H. P. Dodd & Ernestine Dodd, his wife, whose names are signed to the writing above bearing date the 13 day of November, 1967, has this day acknowledged the same before me in my said county.

Given under my hand this 20 day of November, 1967.

DORSEY C. MARTIN
Notary Public, State of West Virginia
My Commission Expires June 10, 1977

My commission expires _____.

Dorsey C. Martin
Notary Public

STATE OF _____,

COUNTY OF _____, TO-WIT:

I, _____, a Notary Public of said county, do certify that _____, whose name _____ signed to the writing above bearing date the _____ day of _____, 19__, has this day acknowledged the same before me in my said county.

Given under my hand this _____ day of _____, 19__.

My commission expires _____.

_____
Notary Public

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, TO-WIT:

I, M. M. Miller, a Notary Public of said county, do certify that J. H. Ferrell, Vice President, whose name is signed to the writing hereto annexed bearing date the 13th day of November, 1967, for United Fuel Gas Company, has this day in my said county, before me, acknowledged the said writing to be the act and deed of said corporation.

Given under my hand this 27th day of November, 1967.

My commission expires August 21, 1977.

M. M. MILLER
Notary Public, State of West Virginia
My Commission Expires Aug. 21, 1977

M. M. Miller
Notary Public

3 - 53845

This instrument was presented to the Clerk of the County Court of Kanawha County, West Virginia, on DEC 22 1967 and the same is admitted to record

Teste: Paul E. Wehrle Clerk
Kanawha County Court

Lease Book 169 A true copy from the record.
Page 727 Teste: Paul E. Wehrle, Clerk,
Date 9-18-68 By Alma Miller Deputy Kanawha County Court.

PLAINTIFF'S EXHIBIT NO. 23
STIPULATION OF PARTIES FILED JULY 9, 1971, CIRCUIT COURT, KANAWHA COUNTY, WEST VIRGINIA

BOOK 170 PAGE 225

DECLARATION-NOTICE OF UNITIZATION

TO:

ADAM BAILEY and GLADYS BAILEY, his wife; ALTHA HOLMES and C. J. HOLMES, her husband; MAE LANDERS and O. M. LANDERS, her husband; MURIEL C. THOMAS and S. A. THOMAS, her husband; ROSCOE McCLANAHAN and LOIS McCLANAHAN, his wife; HENRY H. McCLANAHAN and JUANITA McCLANAHAN, his wife; L. P. POPPENBARGER and VIRGINIA J. POPPENBARGER, his wife	Part of the Lessors, Lease No. 53531
H. P. WILLIAMS and CONSTANCE WILLIAMS, his wife	Lessors, James S. Ray Lease
JAMES D. KELLY	Lessor, Lease Nos. 62440 and 49034
MAXINE M. O'DELL, Guardian for Linda Gale O'Dell and Douglas B. O'Dell, infants; GARY O'DELL; OLIVE O'DELL CULPEPPER and C. ROSS CULPEPPER, her husband; MARVIN V. CULPEPPER and CARMEN ELAINE CULPEPPER, his wife; CARMEN ELAINE CULPEPPER, Guardian for Charles Wesley Culpepper, James Marvin Culpepper, John Butler Culpepper and Alice Lucille Culpepper, infants; SARAH ANN HULL and MARVIN HULL, her husband; W. P. DODD and ERNESTINE DODD, his wife	Lessors, Lease No. 53845

NOTICE is hereby given that UNITED FUEL GAS COMPANY, a West Virginia corporation, and JAMES S. RAY, of Charleston, West Virginia, have pooled and unitized the gas leasehold estates in the formations below the top of the Corniferous Lime formation in the following described leases situate on

621 Hall; United Fuel Gas Co.
P. O. Box 1273
Charleston, W. Va.

the waters of Martins Branch and Wilkerson Branch, tributaries of Pocatalico River, in Union District, Kanawha County, West Virginia, to form a drilling unit of Two Hundred Seventy (270) acres for the production of gas below the top of the Corniferous Lime formation, to-wit:

U.F.G. Lease No. 53531: undivided interest in 130 acres, surveyed; granted by James N. Bailey et al to United Fuel Gas Company, under date of February 10, 1956, as covering an undivided interest in 152 acres, more or less, and recorded in the office of the Clerk of the County Court of Kanawha County, West Virginia, in Lease Book 142, at page 319; ratified by Violet Dawson Holden et con, Fred L. Bailey et ux, Brown Bailey, widower, Icie Watson et con, and Gertrude Mundy et con, by agreements dated November 28, 1956, and recorded in the aforesaid Clerk's office in Lease Book 142, at pages 85, 72, 84, 123 and 438, respectively; and by Arthur H. Bailey et ux, and Earl Bailey, single, by agreements dated December 14, 1956, and recorded in the aforesaid Clerk's office in Lease Book 142, at pages 121 and 137, respectively; which said lease was amended to provide for pooling for deep gas production by agreement between Adam Bailey et al and United Fuel Gas Company, dated December 15, 1967, and recorded in the aforesaid Clerk's office in Lease Book 170, at page 25.

James S. Ray Lease: undivided interest in 130 acres, surveyed (same tract covered by Lease 53531): granted by H. F. Williams and Constance Williams, his wife, to James S. Ray, under date of November 11, 1967, as covering an undivided interest in 152 acres, more or less, and recorded in the office of the Clerk of the County Court of Kanawha County, West Virginia, in Lease Book 170, at page 8; and amended to provide for pooling for deep gas production by agreement dated December 22, 1967, and recorded in the aforesaid Clerk's office in Lease Book 170, at page 179.

U.F.G. Part Lease No. 62448: 18 acres, surveyed: granted by James D. Holly, single, to United Fuel Gas Company, under date of November 2, 1965, as covering 81 acres, more or less, and recorded in the office of the Clerk of the County Court of Kanawha County, West Virginia, in Lease Book 180, at page 361 (the remaining portion of the leased premises is included in the Brooks McCabe et al 301 acre unit, Lease Book 168, page 656); and amended to provide for pooling for deep gas production by agreement dated November 23, 1967, and recorded in the aforesaid Clerk's office in Lease Book 160, at page 681.

U.F.G. Lease No. 49034: 34 acres, surveyed: granted by William S. Pugh and Lorena E. Pugh, his wife, to United Fuel Gas Company, under date of April 15, 1951, as covering 72 acres, more or less, and recorded in the office of the Clerk of the County Court of Kanawha County, West Virginia, in Lease Book 127, at page 418; and amended to provide for pooling for deep gas production by agreement between James D. Kelly and United Fuel Gas Company, dated November 23, 1967, and recorded in the aforesaid Clerk's office in Lease Book 169, at page 689.

U.F.G. Lease No. 53845: 68 acres, surveyed; granted by Marvin Hull and Sarah Ann Hull, his wife, and Maxine H. O'Dell, Guardian et al to United Fuel Gas Company, under date of December 27, 1957, as covering 68 acres, more or less, and recorded in the office of the Clerk of the County Court of Kanawha County, West Virginia, in Lease Book 145, at page 67; and ratified by W. P. Dodd and Ernestine Dodd, his wife, by agreement dated February 17, 1967, and recorded in the aforesaid Clerk's office in Lease Book 164, at page 314; which said lease was amended to provide for pooling for deep gas production by Maxine H. O'Dell, Guardian et al by agreement dated November 6, 1967, recorded as aforesaid in Lease Book 169, at page 719, and by Sarah Ann Hull and Marvin Hull, her husband, and W. P. Dodd and Ernestine Dodd, his wife, by agreement dated November 13, 1967, and recorded as aforesaid in Lease Book 169, at page 727.

To the aforesaid leases, agreements and records reference is here made for all purposes.

Said leases are shown and identified on the plat attached hereto and made a part hereof, entitled "Map Showing Drilling Unit Declared by United Fuel Gas Company and James S. Ray, containing 270 acres, Martins Branch & Wilkerson Branch, Union Dist., Kanawha County, W. Va., Scale 1" = 1320', Dated January 8, 1968."

Each of the aforesaid leases will participate in the unit in the proportion indicated below:

Lease No. 53531 } James S. Ray Lease }	48.148%
Lease No. 62440	6.667%
Lease No. 49034	20.000%
Lease No. 53945	25.185%

This declaration-notice forming this drilling unit is made by authority of and pursuant to the pooling provisions contained in the aforesaid amendatory agreements to the aforesaid leases.

IN WITNESS WHEREOF, the said United Fuel Gas Company has caused its corporate name to be hereunto subscribed and its corporate seal hereunto affixed by its officers thereunto duly authorized, and the said James S. Ray has signed his name and affixed his seal, all as of this the 10th day of January, 1968.

UNITED FUEL GAS COMPANY
By _____
Vice President

ATTEST:
Herbert W Bryson
Assistant Secretary

James S Ray (SEAL)
James S. Ray

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, TO-WIT:

I, R L Wookey, a Notary Public of said county, do certify that T L Bayne Vice President, who signed the writing hereto annexed bearing date the 10th day of January, 1968, for UNITED FUEL GAS COMPANY, has this day in my said county, before me, acknowledged the said writing to be the act and deed of said corporation.

Given under my hand this 10th day of January, 1968.

My commission expires December 17, 1976.

R. L. WOOKEY
Notary Public, State of West Virginia
My Commission Expires Dec. 17, 1976

R L Wookey
Notary Public

STATE OF West Virginia
COUNTY OF Kanawha, TO-WIT:

I, G W Mason, a Notary Public of said county, do certify that JAMES S. RAY, whose name is signed to the writing hereto annexed bearing date the 10th day of January, 1968, has this day acknowledged the same before me in my said county.

Given under my hand this 10th day of January, 1968.

My commission expires Dec. 19 1975.

G W Mason
Notary Public

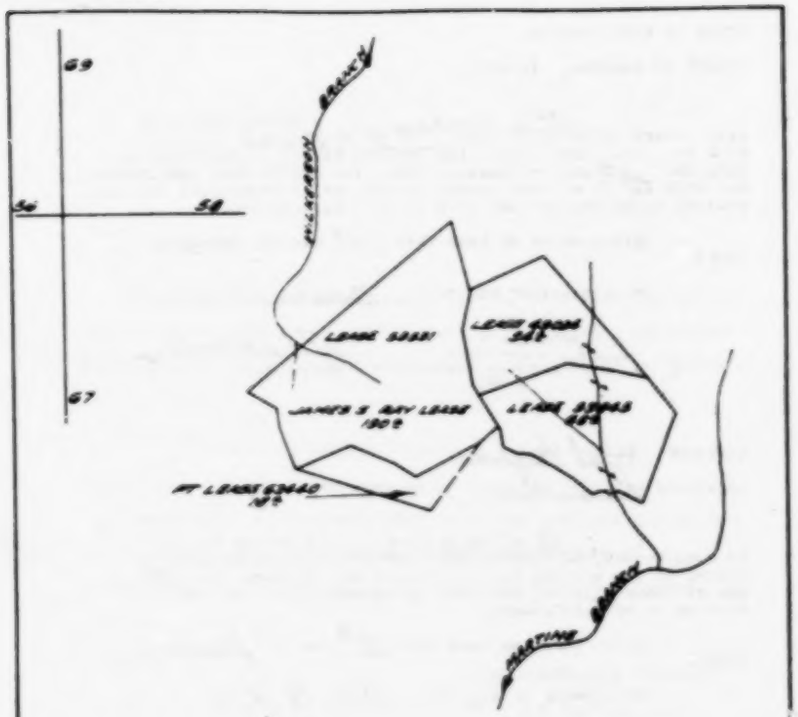
This instrument was prepared by
Joseph C. Crim, P. O. Box 1273,
Charleston, West Virginia.

This Instrument was presented to the Clerk of the County Court of Kanawha County, West Virginia, on JUN 11 1968 and the same is admitted to record.

Teste: Paul E. Wehrle Clerk
Kanawha County Court

Lease Book 170 A true copy from the record.
Page 225 Teste: Paul E. Wehrle, Clerk,
6-18-68 By Alice McClain Deputy Kanawha County Court.

BOOK 170 PAGE 230



MAP SHOWING DRILLING UNIT
DECLARED BY
UNITED FUEL GAS COMPANY AND JAMES S. RAY
CONTAINING 270 ACRES
MARTINS BRANCH & WILDERSON BRANCH,
UNION DIST., KANAWHA COUNTY, W.VA.
SCALE 1"=1320' DATED JANUARY 6, 1968

PLAINTIFF'S EXHIBIT NO. 25
STIPULATION OF PARTIES FILED JULY 9, 1971, CIRCUIT COURT, KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA
DEPARTMENT OF MINES
OIL AND GAS DIVISION
WELL RECORD

Rotary ☑ Spudder ☐ Cable Tools ☐ Storage ☐
Oil or Gas Well Gas

Charleston
KAH-2232

United Fuel Gas Company
P.O. Box 1273 Charleston, W. Va. 25325
Sarah A. Bull, et al Acres 290 Merge
Martin Branch
3466 P.I. Elev. 821.28'
Union County Kanawha
The surface of tract is owned in fee by
Address
Mineral rights are owned by Sarah Ann Bull, et al
Address Charleston, W.Va.25318
Drilling commenced 3-20-68
Drilling completed 3-26-68
Date Shot From To
Open Flow /10ths Water in Inch
/10ths Merc. in Inch
Volume 100,000,000 Newburg Cu. Ft.
Rock Pressure 2010 lbs. hrs.
Oil bbls, 1st 24 hrs.
WELL ACIDIZED (DETAILS)
WELL FRACTURED (DETAILS)

Casing and Tubing	Used in Drilling	Left in Well	Packers
13 3/8"	63' Cemented from 64' to surface		Kind of Packer
9-5/8"	1924' Cemented from 1925 to surface		Size of
7"xxxx	5595' Cemented from 5595'		Depth set
3			
2 3/8" Tubing		5616'	Perf. top
Liners Used			Perf. bottom
			Perf. top
			Perf. bottom

Attach copy of cementing record.
CASING CEMENTED SIZE No. Ft.
Amount of cement used (bags)
Name of Service Co.
COAL WAS ENCOUNTERED AT FEET INCHES
FEET INCHES FEET INCHES

RESULT AFTER TREATMENT (Initial open Flow or Vols.) 100,000,000
ROCK PRESSURE AFTER TREATMENT HOURS
Fresh Water Feet Salt Water Feet
Producing Sand Depth

Formation	Color	Hard or Soft	Top	Bottom	Oil, Gas or Water	Depth	Remarks
Coal			0	20	Gas in Newburg Est. 45,000 Mcf		
Sand			20	73			
Red Rock and Sand			73	450			
Sand			450	1005	Test before fracture - 45,000 Mcf		
Salt Sand			1005	1615	Fractured Newburg 4-1-68 with 1,000gals.		
Lime			1615	1780	acid, 39,060 gallons fluid, 30,000#		
Injun Sand			1780	1860	20-40 sand.		
Shale			1860	2325	Final test after fracture- 100,000		
Slates			2325	2335	Mcf Four Point Potential Test		
Shale			2335	4790			
Corniferous Lime			4790	4878			
Oriskany			4878	4918			
Lime			4918	5400			
Helderlie			5400	5635			
Unknown			5635				
Total Depth			5638'				

Plaintiff's Exhibit No. 25

JUL 1971

Defendant's Exhibit No. 1
STIPULATION OF PARTIES FILED JULY 9, 1971, CIRCUIT COURT, KANAWHA COUNTY, WEST VIRGINIA

U.F. Defendant's Exhibit No. 1
June Stipulation of Parties filed July 9, 1971, Circuit Court, Kanawha County, West Virginia

8-5207-68
Accts. Rec. 8-5216-68

WELL NO. 9486 PI

COMPANY United Fuel Gas Company BUDGET NO. 1805 WORK ORDER NO. 2861-12
DIVISION Northern DATE REQUESTED March 25, 19 68 DATE ISSUED April 3, 19 68
DISTRICT Union COUNTY Kanawha STATE West Virginia
FARM Sarah A. Hull, ET. AL LEASE NO. 53531 et al ACRES 270
ON WATERS Martin Branch MAP SQUARE 58-67 COAL Not Operated
LOCATION MADE BY E. White DATE February 19, 19 68 NOTE BOOK 2113 PAGE 53
LEASE EXPIRES 19 NO BUILDINGS WITHIN 400 FEET CLASS OF LOCATION A
PURPOSE AND NECESSITY Increase Production
RELATED WORK ORDER NOS. FOR

TYPE AND DATE OF WORK	CHECK PERMITS OR SERVICES REQUIRED
DRILL NEW WELL ☒ EST. START March 20, 19 68	RIGHT OF WAY FOR ROAD ☐ DRILLING PERMIT ☒
DRILL WELL DEEPER ☐ EST. COMP. March 29, 19 68	WELL LINE ☐ ABANDONMENT PERMIT ☐
ABANDON WELL ☐	MEASURING EQUIPMENT ☐ SURVEY FOR W. S. LINE ☐

ESTIMATED DEPTH 5680 FEET. SAND Newburg CONTRACTOR Ray Brothers Corporation

APPROVALS

C. V. Clarkson DATE March 25, 19 68 A. E. Hardman (AVK) DATE March 27, 19 68
J. R. Henning DATE March 26, 19 68 DATE 19

DETAIL OF ESTIMATED COST					DETAIL OF ACTUAL COST			
MATERIAL TO BE INSTALLED	SIZE	QUANTITY	PRICE	AMOUNT	QUANTITY	PRICE	AMOUNT	VARIATION
CASING H WEIGHT 48#	13"	64'	7.41	474.	64'	5.768	369.16	(104.84)
CASING H 32#	9"	1900'	3.66	6,954.	1938'	3.657	7,087.26	133.26
CASING N-80 23#	7"	5650'	3.25	18,363.	5613'	3.247	18,225.41	(137.59)
TUBING J 4.6#	2"	5700'	.63	3,591.	5630'	.629	3,541.27	(49.73)
Road Casing	16"	208'	2.79	580.			-	(580.00)
Well Head Equipment				3,500.			3,357.96	(142.04)
Upset Nipple	2-3/8"			-	1		91.90	91.90
Misc. Fittings				-	Lot		83.88	83.88
Nord Plug Valve #3044	2"			-	1		154.01	154.01
TOTAL MATERIAL				33,462.			32,910.85	(551.15)
INSTALLATION OR RETIREMENT COST								
LABOR				4,000.			3,587.17	(412.83)
USE OF AUTOMOBILE AND HAULING				3,500.			3,255.44	(244.56)
DRILLING 5595 FEET @ 5.25 PER FOOT				29,374.	5583'@ $5.25		29,310.75	(63.25)
Misc. Costs per rider attached				-			3,677.47	3,677.47
SUPPLIES AND EXPENSES				500.			506.26	6.26
ENGINEERING SURVEY				220.			440.32	220.32
Logging				2,000.			-	(2,000.00)
Cement & Services				3,500.			4,742.58	1,242.58
Mud & Chemicals				1,500.			1,236.60	(263.40)
Fracturing Services				5,000.			8,492.42	3,492.42
Extra Labor to Contractor & Rig Time				2,000.			2,474.05	474.05
Float Shoe				100.			111.92	11.92
Float Collar				300.			243.03	(56.97)
Centralizers				200.			228.58	28.58
Rotary Bits				800.			754.80	(45.20)
Casing Service - Run 7" Casing				350.			406.00	56.00
Rental of Equipment				4,000.			4,646.50	646.50
STORES EXPENSE AND FREIGHT				6,023.			5,633.32	(389.68)
LABOR OVERHEADS				644.			645.66	1.66
INTEREST				264.			355.35	91.35
ADMINISTRATIVE AND GENERAL LABOR OVERHEADS				794.			841.80	47.80
TOTAL INSTALLATION OR RETIREMENT COST				65,069.			71,590.02	6,521.02
TOTAL ESTIMATE				98,531.			104,500.87	5,969.87

Comm. 11 WELL NO. 9486 PI

COMPLETION REPORT

ROAD STARTED 3-6, 19 68 DRILLING STARTED 3-20, 19 68 DRILLING COMPLETED 3-26, 19 68
DAYS DRILLING 6 TOTAL DEPTH 5618 PLUGGED BACK TO CONTRACTOR Ray Brothers Corp.
INITIAL OPEN FLOW 45 MMCF OPEN FLOW AFTER FRACTURE 100 MMCF
INITIAL ROCK PRESSURE 1969 LBS. DATE SHUT IN 3-26, 19 68 PRODUCING SAND Newburg
PLUGGING STARTED 19 COMPLETED 19 CONTRACTOR

MATERIAL INSTALLED OR RETIRED

QUANTITY	SIZE	DESCRIPTION	QUANTITY	SIZE	DESCRIPTION
64'	13"	Casing Sm H 48#	450,900#		Crushed Rock
** 1938'	9"	Casing Sm H 32#	24	1-1/8x7⅛"	Stud Bolt
5613'	7"	Casing Sm N 23#		4-gal	Bakerlok Thd Compound
5630'	2"	Tubing Sm J 4.6#			
208'	16"	Road Casing			
1	9"	Casing Head 3000#	* 1		RS-2345 Shaffer Stripper Rubber
1	4"	Nipple XH	* 3		2-3/8" EUE Sub Nipples
1	2"	Plug Valve Nord Flg. 3044	* 2		2-3/8" Tubing Couplings [illegible]
1	2"	Nipple XH	* 1		2-3/8" Upset Baker [illegible] Nipple #801-30-4479
1	2"	Steel Plug			
1	2"	Bull Plug	* 1		2-3/8" [illegible] Type [illegible] Tubing Plug #819-09-2153
1	½"	Needle Valve Sc 10,000#			
2	4"	B-W Grove Ball Valve 3000#			
1	2"	B-W Grove Ball Valve 5000#			
1	9"	Baker Collar			* per Dodd 6-5-68
1	9"	Baker Shoe			
2	9"	Baker Basket #231-02			
5	9"	Baker Centralizer			
1	7"	Baker M & F Collar			** per Clark 6-10-68
1	7"	Baker Shoe			
5	7"	Baker Centralizer			
1	12"	Pressure Record Gauge			
1	6¼"	YC40-JA Reed Cortura Bit			*** 6-26-68
50-sks		Aquagel			
15-sks		Dextrid			
10-sks		CS Hulls			
10-sks		Plug Git			
10-sks		Cello Flakes			
1-Drum		Surflo B-11			

MATERIAL TRANSFER NUMBERS AND PURCHASE ORDER NUMBERS 1968 3-157 3-160 3-189 3-291 3-344, 4-28 *
4-50 4-52 4-57 4-60 4-65 4-191 4-254 4-262 P.O. 131,176,1921 5,20859,21135
5-162 5-192 ***

COMPILED BY Henry O. Dodd DATE April 23, 19 68
APPROVED BY W. E. Clark DATE April 24, 19 68

Distribution of Costs

		Material	Installation	Total
James S. Ray	30.7747%	10,128.21	21,922.26	32,050.47
United Fuel Gas Co.	69.2253%	22,782.64	49,667.76	72,450.40
		32,910.85	71,590.02	104,500.87

RECEIVED APR 25 1968 PLANT ACCOUNTING DEPT.

REASON FOR VARIATION FROM ESTIMATE: Well was not logged.

FORM U-467 CRD

WORK ORDER RIDER

UNITED FUEL GAS COMPANY

BUDGET NO. 1805 **WORK ORDER NO.** 2861-12

DETAIL OF EXPENDITURES							
INSTALLATION COSTS	SIZE	ESTIMATE			ACTUAL		VARIATION
		QUANTITY	PRICE	AMOUNT	QUANTITY	AMOUNT	
Nitrogen Service				-		1,606.12	1,606.12
Baker Baskets	9-5/8"			-		171.60	171.60
Crushed Stone				-		1,233.72	1,233.72
Road Casing .250W	16"	208'		-		508.53	508.53
Material Junked				-		157.50	157.50
						3,677.47	3,677.47

Dep. 33

PLAINTIFF'S EXHIBIT NO. 26
STIPULATION OF PARTIES FILED JULY 9, 1971, CIRCUIT COURT, KANAWHA COUNTY, WEST VIRGINIA

Plaintiff's Exhibit No. 26
Stipulation of Parties filed July 9, 1971, Circuit Court, Kanawha County, West Virginia

Nº 264 P-44

CERTIFICATE OF REDEMPTION OF LANDS
STATE OF WEST VIRGINIA
7.25.60 172720
AUDITOR'S OFFICE, CHARLESTON July 26 19 60

RECEIVED OF [illegible], Attorney, 701 Charleston National Bank Building, Charleston, West Virginia 25301

One Hundred - one 36/ DOLLARS

in full payment of taxes, interest and costs due, for the years shown, against the land described as:

60 A, 1/4 O & G Interest, Waters Martins Branch

situate in Kanawha County

Union District

Municipal

delinquent or forfeited in name of:

Pearson, Cecle G. 19 33 to 19 60

DELINQUENCIES OR FORFEITURES PAID					
Year	Taxes	Interest	Year	Taxes	Interest
19	FORFEITED FOR NON-ENTRY FOR YEARS 1933 to 1960 INCLUSIVE		53 1954	Ex.A. 1.05 / 1.10	[illegible]
38 1939 1940	Ex.A. .94 / .99 / .93	3.33 / 3.36 / 3.33	55 1956	1.00 / 1.00	[illegible] / 1.4
41 1942 1943	.92 / .92 / .33	[illegible] / 2.70 / 2.49	57 1958 [illegible]	1.10 / 1.06 / [illegible]	1.3 / [illegible]
44 1945 1946	.97 / .93 / .90	[illegible] / 2.43 / 2.72	60 1961 1962	1.57 / 1.54 / 1.53	1.4 / [illegible]
47 1948 1949	.93 / 1.04 / 1.12	2.21 / 2.43 / 2.49	53 [illegible] 1965	1.51 / 1.51 / 1.50	[illegible]
50 1951 1952	1.13 / .95 / 1.07	2.31 / 1.88 / 1.99	66 1967 1968	1.50 / 1.50 / 1.50	[illegible] / .1

TOTAL TAXES 36.38
TOTAL INTEREST 58.22
PUBLICATION FEE
CERTIFICATE FEE [illegible]
TOTAL AMOUNT PAID [illegible]

Virgil L. Gaines
Auditor of West Virginia

This certificate is a receipt for the money paid and a release of the State's title or claim to the land redeemed for the years shown. Payment is accepted and given by virtue of Section 8, Article 3, Chapter 11-A of the Code of West Virginia, as enacted by Chapter 117, Regular Session 1941, and amendments thereto.

This certificate is issued conditioned on the final payment of check, draft or etc., given in payment thereof and is issued in triplicate, the original filed in Auditor's office; the duplicate (blue) redemptioner's copy; and the triplicate (pink) to be recorded, filed and indexed in the County Clerk's Office.

A true copy from the original filed for record in the office of the Clerk of the County Court of Kanawha County.

Sept. 11, 1970

Teste: JACK L. PAULEY, Clerk
By [signature] Deputy

IN THE CIRCUIT COURT OF
KANAWHA COUNTY,
WEST VIRGINIA

Civil Action No. 8310

[Title Omitted]

[Filed June 21, 1972]

ORDER

This day came counsel for the respective parties, the Court having previously announced its opinion to deny the motion of the plaintiff to set aside the order of this Court entered on June 19, 1972, and to order a new trial as prayed for therein.

Therefore, it is accordingly ORDERED that the plaintiff's motion to set aside the order of this Court entered on June 19, 1972, and to order a new trial and to grant the relief prayed for in said motion, which said motion is here filed, be, and the same is overruled and the relief prayed for therein denied, to which action the plaintiff does hereby except and object, and it is further ORDERED that the Court's letter memorandum of opinion be amended to read on page 10 thereof that this action was not submitted to the Court for decision until July 9, 1971.

Thereupon, on motion, plaintiff is granted a stay of execution in this matter for a period of ninety (90) days from this date in order to permit her to petition the Supreme Court of Appeals of West Virginia for a writ of error and supersedeas.

WHEREUPON, in view of the present intention of the plaintiff, the Clerk of this Court is directed to prepare the official transcript of the proceedings had, Interrogatories, Answers thereto, Depositions, Stipulations, and Exhibits and findings of fact and conclusions of law, now here ORDERED filed and made a part of the record herein

for certification by the official reporter of this Court for use on appeal.

This 21st day of June, 1972.

Enter:

/s/ Frank L. Taylor

Judge

[Attorneys' Approval Omitted]

Dunbar Printing Co., Dunbar, W. Va.

AFFIDAVIT OF SERVICE OF APPENDIX

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, TO-WIT:

I, PHILIP G. TERRIE, attorney for Cecle G. Pearson, Appellant herein, depose and say that on the 4th day of August, 1976, I served three copies of the foregoing Appendix upon W. P. Dodd and Ernestine Dodd, his wife, Appellees herein, by depositing the same in a United States Post Office or mail box with first class postage prepaid, addressed to William E. Hamb, counsel of record for said W. P. Dodd and Ernestine Dodd, his wife, at his office at 950 Kanawha Boulevard, East, Charleston, West Virginia 25301, and further, that I served three copies of the foregoing Appendix upon Columbia Gas Transmission Corporation, Appellee herein, by depositing the same in a United States Post Office or mail box with first class postage prepaid, addressed to William Roy Rice, counsel of record for said Columbia Gas Transmission Corporation, at his office at P. O. Box 1273, Charleston, West Virginia 25325, and also that I served three copies of the foregoing Appendix upon Columbia Gas Transmission Corporation, Appellee herein, by depositing the same in a United States Post Office or mail box with first class postage prepaid, addressed to Thomas E. Morgan, counsel of record for said Columbia Gas Transmission Corporation, at his office at P. O. Box 1273, Charleston, West Virginia 25325.

/s/ Philip G. Terrie

Subscribed and sworn to before me by Philip G. Terrie, at Charleston, West Virginia, this 4th day of August, 1976.

My commission expires September 24, 1978.

/s/ Mary C. Matheny
Notary Public in and for
Kanawha County, West Virginia

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1318

CECLE G. PEARSON,

Appellant,

v.

W.P. DODD; ERNESTINE DODD, his wife; and COLUMBIA GAS TRANSMISSION CORPORATION,

Appellees.

ON APPEAL FROM A DECISION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MOTION TO DISMISS OR AFFIRM

Of Counsel

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Columbia Gas Transmission Corporation

April 9, 1976

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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ON APPEAL FROM A DECISION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MOTION TO DISMISS OR AFFIRM

This Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Appeals of West Virginia on the grounds that it is manifest that this appeal does not present a substantial federal question, that the judgment below clearly rests on an adequate non-federal basis, and on other grounds which this Appellee will present herein which establish that this Court should not set this case for argument.

OPINIONS BELOW

The opinion below by Chief Justice Haden of the Supreme Court of Appeals of West Virginia is reported at 221 S.E.2d 171 (W. Va. 1975). A copy of the opinion below is set out in full in Appendix A, appended to Appellant's Jurisdictional Statement.

The judgment of June 19, 1972, by the Circuit Court of Kanawha County, West Virginia, incorporating the Court's memorandum of opinion of April 17, 1972, is set out in full in Appendix B, appended to Appellant's Jurisdictional Statement.

JURISDICTION

The suit involved in this appeal was brought by Appellant herein to set aside as a cloud upon her alleged title to an oil and gas interest a conveyance of such interest by a tax deed made pursuant to a state statute. The judgment of the Supreme Court of Appeals of West Virginia was filed on December 18, 1975. Notice of Appeal was filed with the Supreme Court of Appeals on February 26, 1976.

The asserted jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. § 1257(2) or, in the alternative, § 1257(3).

STATUTES INVOLVED

The case involves the validity of West Virginia Code §§ 11A-4-12 and 11A-3-8. These statutes are set out in Appendix C, appended to Appellant's Jurisdictional Statement.

QUESTION PRESENTED

The question presented for review is: Whether under the requirements of due process of law embodied in the fourteenth amendment to the United States Constitution a West Virginia statute may permit a tax sale of real property, owned by the State, upon publication naming the former owner as a defendant and also naming, as defendants, unknown parties claiming under the former owner.

STATEMENT OF THE CASE

By a deed executed and recorded in 1937, the Appellant, Cecle G. Pearson, acquired a one-fourth interest in all of the oil and gas in sixty-eight acres of land located in Kanawha County, West Virginia. Although the Appellant did not cause a change of the entry in the Land Books (the official assessment rolls for real property in West Virginia) from the former owner's name to her own, Appellant's husband paid the real estate taxes on her interest from 1938 until 1960. No taxes were paid on Appellant's interest in 1961. As a result of this nonpayment, in 1962 the property embraced by the assessment of Appellant's interest (a mineral interest) was declared delinquent and was sold to the State of West Virginia pursuant to statute.

In 1966, the Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County (the statutory officer of the State charged with the duty of selling delinquent and irredeemable real estate) instituted a statutory suit in the name of the State for the sale of this real property interest. On April 26 of that year, in

keeping with orders entered in the suit, the Deputy Commissioner conveyed by a tax deed to Appellee W.P. Dodd (the purchaser at the Deputy Commissioner's sale), the property assessed in the name of H.C. Pearson, Jr. In 1967, Mr. Dodd and his wife ratified an existing lease upon the sixty-eight acres held by United Fuel Gas Company, and granted United the right to drill a natural gas well. This well was completed in 1968 at a cost of $104,500.87 and produced an initial open flow of one hundred million cubic feet of gas. Columbia Gas Transmission Corporation, this Appellee, is the successor in interest to United.

On July 26, 1968, Mrs. Pearson paid the State Auditor $101.86 and received what was designated a Certificate of Redemption of Lands in her name for the property in question. However, at that time, the property was irredeemable under Code § 11A-3-8 and the attempted redemption was, within the statutory intention, of no effect. Appellant subsequently filed this suit against the Dodds and United Fuel.

West Virginia Code § 11A-4-12 permits the sale of delinquent property interests previously sold to the State and irredeemable (the situation involved in this case) upon notice by publication upon "unknown parties who are or may be interested in any of the lands included. . . ." A statutorily sufficient notice of the sale in question was given by publication.

Upholding the statutory scheme for tax sales and affirming that this particular sale was in keeping therewith and in keeping with due process requirements, the Circuit Court granted judgment for the defendants-appellees. In its letter memorandum of opinion, it held, *inter alia*, that the notice provisions of § 11A-4-12 did not deny the plaintiff-appellant due

process of law under the State Constitution or the United States Constitution. The Supreme Court of Appeals of West Virginia affirmed the judgment of the Circuit Court.

ARGUMENT

WEST VIRGINIA CODE §11A-4-12 PERMITTING A TAX SALE OF REAL PROPERTY, OWNED BY THE STATE, UPON PUBLICATION NAMING THE FORMER OWNER AS A DEFENDANT AND ALSO NAMING UNKNOWN PARTIES CLAIMING UNDER HIM AS DEFENDANTS DOES NOT DENY DUE PROCESS OF LAW.

Almost eighty years ago this Court directed its attention to the question again before this Court on appeal by Pearson. In a case styled *King v. Mullins*, 171 U.S. 404 (1898), the very question before this Court was whether the system of taxation in the State of West Virginia, and its provisions for forfeitures, were repugnant to the fourteenth amendment of the Constitution of the United States. In holding that the system established by the State of West Virginia is not inconsistent with the due process of law required by the Constitution of the United States, this Court said:

> "The judiciary should be very reluctant to interfere with the taxing systems of a state, and should never do so unless that which the state attempts to do is in palpable violation of the constitutional rights of the owners of property. Under this view of our duty, we are unwilling to hold that the provision referred to is repugnant to the clause of the 14th Amendment forbidding a denial of the equal protection of the laws."

The principles governing the situation in this appeal by Pearson are more recently and succinctly endorsed in a case styled *Balthazar v. Mari Ltd.*, 301 F. Supp. 103 (N.D. Ill. 1969), *aff'd* 396 U.S. 114 (1969), wherein the Court below said:

> "Relying upon Supreme Court condemnation cases, plaintiffs also maintain that they were deprived of 'just compensation' for their property. See, *e.g.*, United States v. Miller, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336 (1943); City of Cincinnati v. Vester, 281 U.S. 439, 50 S.Ct. 360, 74 L.Ed. 950 (1930); Dohany v. Rogers, 281 U.S. 362, 50 S.Ct. 299, 74 L.Ed. 904 (1930); Brown v. United States, 263 U.S. 78, 44 S.Ct. 92, 68 L.Ed. 171 (1923); Chicago Burlington and Quincy R. Co. v. City of Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897). These cases are inapplicable. Rather than taking private property for a public purpose, Illinois is here collecting taxes which are admittedly overdue."

Once again, the Court cited with approval the definitive and determinative decision of *King v. Mullins, supra.*

To some considerable extent, the decision in *King* was founded upon the earlier decision of this Court in the case styled *Bell's Gap Railroad v. Pennsylvania*, 134 U.S. 232, 239 (1890), wherein this Court declared:

> " 'The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain. It involves no violation of due process of law, when it is executed according to customary forms and established usages * * *.' "

In the *Balthazar* holding, affirmed by this Court, the Court below cited with approval as late as 1969 the holding of this Court in the *Bell's Gap Railroad* case, *supra.*

In a case styled *King v. West Virginia*, 216 U.S. 92 (1910), which was a companion case to *King v. Mullins, supra*, once again the Appellant raised the spectre of an alleged denial of due process under the fourteenth amendment. Because of the previous holding by this Court in *King v. Mullins*, in *King v. West Virginia* this Court said then (and the expression is apt to this appeal): "The question is not open and we shall discuss it no more." Appellee submits that as long ago as 1898 it was determined that the system for perfecting tax deeds in West Virginia does not violate the due process provisions of the fourteenth amendment.

In *Kentucky Union Co. v. Kentucky*, 219 U.S. 140 (1911), as against a claim of denial of due process under the fourteenth amendment to the Constitution, this Court upheld the Kentucky Act of 1906 Relating to Revenue and Taxation. As recited in the opinion, the Kentucky Act permitted a proceeding by publication "in the name of the Commonwealth of Kentucky, as plaintiff, against the said tract of land and the owners or claimants of said land, as defendants, naming them if their names are known to him, and if their names are unknown to him, designating them as unknown owners and claimants thereof". This Appellee submits that the Appellant was proceeded against here by publication as an unknown defendant because she was an unknown defendant, and that she was not denied due process within the holding of the *Kentucky Union* case.

In *Leigh v. Green*, 193 U.S. 79, 90 (1903), the Nebraska statute involved clearly authorized a foreclosure to satisfy a tax lien without actual service against all lienholders within the jurisdiction of the Court. In upholding the statutory provisions for process by publication, this Court observed:

"Nor is the remedy given in derogation of individual rights, as long recognized in proceedings *in rem*, when the 14th Amendment was adopted. The statute undertakes to proceed *in rem*, by making the land, as such, answer for the public dues. Of course, merely giving a name to an action as concerning the thing rather than personal rights in it cannot justify the procedure if in fact the property owner is deprived of his estate without due process of law. But it is to be remembered that the primary object of the statute is to reach the land which has been assessed. Of such proceedings, it is said in Cooley on Taxation, 2d ed. 527: 'Proceedings of this nature are not usually proceedings against parties, nor, in the case of lands or interests in lands belonging to persons unknown, can they be. They are proceedings which have regard to the land itself rather than to the owners of the land; and if the owners are named in the proceedings, and personal notice is provided for, it is rather from tenderness to their interests, and in order to make sure that the opportunity for a hearing shall not be lost to them, than from any necessity that the case shall assume that form.' "

In *Ballard v. Hunter*, 204 U.S. 241, 262 (1907), in upholding an Arkansas statute, which permitted other than personal service, against the onslaught of alleged violation of due process of the fourteenth amendment, this Court said:

> "It should be kept in mind that the laws of a state come under the prohibition of the 14th Amendment only when they infringe fundamental rights. A law must be framed and judged of in consideration of the practical affairs of man. The law cannot give personal notice of its provisions or proceedings to everyone. It charges everyone with knowledge of its provisions; of its proceedings it

must, at times, adopt some form of indirect notice, and indirect notice is usually efficient notice when the proceedings affect real estate. Of what concerns or may concern their real estate men usually keep informed, and on that probability the law may frame its proceedings; indeed, must frame them, and assume the care of property to be universal, if it would give efficiency to many of its exercises. This was pointed out in Huling v. Kaw Valley R. & Improv. Co. 130 U.S. 559, 32 L. ed. 1045, 9 Sup. Ct. Rep. 603, where it was declared to be the 'duty of the owner of real estate, who is a non-resident, to take measures that in some way he shall be represented when his property is called into requisition; and, if he fails to get notice by the ordinary publications which have been usually required in such cases, it is his misfortune, and he must abide the consequences.' It makes no difference, therefore, that plaintiffs in error did not have personal notice of the suit to collect the taxes on their lands or that taxes had been levied, or knowledge of the law under which the taxes had been levied."

As observed in the decision in this case by the Supreme Court of Appeals of West Virginia, under Code § 11A-3-8 if redemption by the owner does not occur within eighteen months of the date that the tax delinquent property is sold to the State of West Virginia, then absolute title vests in the State of West Virginia. The interest of Appellant was sold to the State in 1962. The publication of which Appellant complains occurred in 1966 at a time when the State, in effect, was auctioning off land which it owned because of the previous delinquent tax procedure.

Decisions of the Supreme Court of Appeals of West Virginia have consistently held that the former owner has no right to be a party to the proceedings for the

sale of land previously sold to the State of West Virginia for delinquent taxes. *State v. Simmons*, 135 W.Va. 196, 64 S.E.2d 503 (1951); *State v. Gray*, 132 W.Va. 472, 52 S.E.2d 759 (1945); *State v. Blevins*, 131 W.Va. 350, 48 S.E.2d 174 (1948); *McClure v. Maitland*, 24 W.Va. 561 (1884).

Appellant cites the authority of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), to the following effect:

> "Where the names and post office addresses of those affected by a proceeding are at hand, the reason disappears for resort to means less likely than the mails to apprise them of its pendency." (At page 318 of 339 U.S.)

In the factual situation in this case involving the Appellant Pearson, the notice complained of occurred in 1966. The record is devoid of any indication that the Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia, knew or should have known the name or address of the Appellant. Indeed, in her statement of the case, the Appellant concedes that in spite of the deed to her from H.C. Pearson, Jr. in 1937, the Appellant did not have corrected the entry in the Land Books from the former owner's name to her own.

The plain import of the Appellant's position is that a valid tax sale in 1966 required the State to pursue a record title search for a period of thirty years going back to 1937, to find Appellant's name and claimed interest, and then to pursue some further inquiry as to her address, despite the impossibility or impracticability of such an endeavor by reason of the passage of almost thirty years.

This contention is best answered by the authority of *City v. New Rochelle v. Echo Bay Waterfront Corp.*, 49 N.Y.S.2d 673, 268 App. Div. 182, *aff'd* 60 N.E.2d 838, 294 N.Y. 678, *cert. denied*, 326 U.S. 720 (1945), to the following effect:

> "It is settled law, however, that indirect notice is sufficient to persons interested in real property which is in default in payment of taxes. 'The land stands accountable to the demands of the state, and the owners are charged with the laws affecting it and the manner by which those demands may be enforced. Huling v. Kaw Valley Ry. & Imp. Co., 130 U.S. 559, 9 S.Ct. 603, 32 L.Ed. 1045. This accountability of the land and the knowledge the owners must be presumed to have had of the laws affecting it is an answer to the contention of the insufficiency of the service.' Ballard v. Hunter, 204 U.S. 241, 254, 255, 27 S.Ct. 261, 266, 51 L.Ed. 461."

Appellant cites the authority of *Walker v. City of Hutchinson*, 352 U.S. 112 (1956), in which this Court held that newspaper publication of condemnation proceedings against a landowner, whose name was known to the city and on official records, was insufficient notice to meet the requirements of due process.

Once again, there is not the slightest indication that the Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia, knew or should have known the name or address of the Appellant at that time.

With reference to *Walker, supra*, which was a condemnation case, beyond peradventure the landowner who complained of inadequate notice in that case was truly the owner. In the facts involved in this appeal by Pearson, in view of the provisions of Code § 11A-3-8,

after the passage of eighteen months from the sale of Appellant's land in 1962 to the State of West Virginia, the owner was not the Appellant but rather the State of West Virginia.

The case of *Schroeder v. City of New York*, 371 U.S. 208 (1962), cited by Appellant, must be distinguished from the present appeal. Once again, the *Schroeder* case involved a condemnation case wherein the Appellant was admittedly the true owner. Moreover, the record in that case reflected that both the name and address of the Appellant were readily ascertainable. Furthermore, analysis of this decision indicates that the condemning authority did not comply with the requirements for posting, as specified in the enabling legislation, which omission alone violated the requirements of statute.

The case of *Covey v. Town of Somers*, 351 U.S. 141 (1956), also relied on by Appellant, involved the foreclosure of tax liens on real property where the conceded owner of the property (proceeded against by mailing, posting and publication) was an incompetent without the benefit and protection of a guardian. In contrast, in this case the Appellant Pearson concedes that she knowingly did not fulfill her responsibility in changing the entry on the Land Books from the name of the former owner to her own. Moreover, after paying the taxes for the years 1938 through 1960, Appellant concedes that she omited to pay taxes assessed for 1961. Under such facts, the Appellant Pearson can hardly equate her position with that of the incompetent in the *Covey* case.

Since the authorities support this Appellee's position that notice by publication does not deny due process of law, this appeal does not require consideration of whether a statute of limitation (which Appellant

characterizes Code § 11A-3-8) might bar Appellant from contesting the validity of the tax sale.

The Supreme Court of Appeals of West Virginia in its decision against the Appellant Pearson went to the heart of the matter when it held:

> "We have determined that the forceful arguments advanced to restore the property interest of a former owner must, necessarily, fall before compelling State interests,–often recognized in prior decisions and tenaciously maintained in statements of legislative policy–, to resolve uncertainties in land titles and to protect the State's revenues derived from land usage taxation. In this endeavor, we have intended to balance delicately the interests of the individual with those of all the State's citizenry, within the constitutional parameters of due process." (App. at 23A).

Under the authority of *King v. Mullins, supra*, decided by this Court almost eighty years ago and never overruled, innumerable land titles in the State of West Virginia are founded upon the proposition that statutory tax delinquency procedures in West Virginia do not deny due process of the fourteenth amendment to the Constitution. This Appellee respectfully submits that this Court should affirm that principle; indeed any other holding would wreak havoc in the State of West Virginia.

CONCLUSION

Counsel for this Appellee, Columbia Gas Transmission Corporation, respectfully submit that the decision of the Supreme Court of Appeals of West Virginia is clearly correct; that this appeal does not

present a substantial federal question; that the judgment below rests on an adequate non-federal basis; and, that this Court should dismiss this appeal and affirm the decision below.

Respectfully submitted,

DANIEL L. BELL, JR.
Post Office Box 1273
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Counsel for Appellee
Columbia Gas Transmission Corporation

Of Counsel

THOMAS E. MORGAN
WM. ROY RICE
Post Office Box 1273
Charleston, West Virginia 25325

April 9, 1976

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1318

CECLE G. PEARSON,

Appellant

versus

W. P. DODD; ERNESTINE DODD, his wife; and COLUMBIA GAS TRANSMISSION CORPORATION,

Appellees.

ON APPEAL FROM A DECISION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Supplemental Brief to the Supreme Court of the United States, to The Jurisdictional Statement, as requested from Appellant, Cecle G. Pearson, concerning the requirements of Rule 15-1-(d), relating to Due Process.

Philip G. Terrie
1009 Security Building
Charleston, West Virginia 25301

Counsel for Appellant

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

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Supplemental Brief to the Supreme Court of the United States, to The Jurisdictional Statement, as requested from Appellant, Cecle G. Pearson, concerning the requirements of Rule 15-1-(d), relating to Due Process.

Philip G. Terrie
1009 Security Building
Charleston, West Virginia 25301

Counsel for Appellant

Pursuant to the request of the Supreme Court of the United States, for further information under Rule 15-1-(d), of the Supreme Court of the United States, which request was made to counsel for the Appellant by letter of the Clerk of the Supreme Court of the United States, Michael Rodak, Jr., dated May 21, 1976, the Appellant submits the following:

I.

The suit as filed seeks to set aside the property assessment on which the tax sale in 1966 is predicated, or in the alternative to hold that the 1966 sale was void for several reasons, including failure to follow Due Process requirements. The Sheriff's sale in 1962, referred to in the letter of May 21, 1976, was questioned as a part of the two prongs of attack. If the assessment was void then everything subsequent thereto was void, including the 1962 Sheriff's sale; and the 1966 Delinquent Land Commissioner's sale. The Appellant was unsuccessful in her assertions in this area in both of the Lower Courts. No Federal question was presented, under the first theory. Under the second theory, the attack on the 1966 Delinquent Land Commissioner's suit, one element which was given for the sale to be void was the element of Due Process. Under Part II of this brief, the record references to this element are contained

II.

DUE PROCESS

This general issue as enunciated in the first argument of the Jurisdictional Statement previously filed with this court was raised as soon as the practice and pleading rules of the State Court in West Virginia would permit, and strongly asserted and briefed at every appropriate opportunity through the long and sometimes arduous steps of this litigation, including the previously referred to assertion in the Jurisdictional Statement to this Court. Due to the form of notice pleading practiced in the State of West Virginia, a form of practice which is very similar to the Federal Rules of Civil Procedure, and also due to the equity nature of this proceeding, the first opportunity for this matter of Due Process to be raised in this action in the Court of first instance was with the initial brief of Appellant, dated August 16, 1971, and filed in the Circuit Court of Kanawha County, West Virginia, on the same date. A brief excerpt from this Memorandum of Law, the Court of first instance under Item III as therein contained, pages 55, 56 and 57 stated:

"III. DUE PROCESS WAS NOT AFFORDED THE PLAINTIFF IN THE TAX SALE PROCEEDING UNDER WEST VIRGINIA CODE, CHAPTER 11A, ARTICLE 4, S 12, (MICHIE 1966), AND UNDER THE PROPER INTERPRETATION OF STATE V. SIMMONS 135 W. VA. 196, 64 S. E. 2d 503 (1951) AND UNDER PROPER INTERPRETATION OF RECENT DECISIONS OF THE UNITED STATES SUPREME COURT CONCERNING THE

DUE PROCESS CLAUSE."

"A. DUE PROCESS."

"The Due Process issue as it specifically applies to this is stated:

> Whether in a suit instituted by the State under the provisions of W. Va. Code Ch. 11A-4-1, Michie (1966), for the purpose of selling, for the benefit of the school fund, lands which have been forfeited or sold to the State for taxes, the owner of the land, who, at the time of the institution of the suit is a resident of the County in which such land is situated and whose right to the land is evidenced by a deed recorded 27 years before the institution of the suit may be proceeded against by being named in the publication as an unknown defendant and the land proceeded against misdescribed so as not to identify the land?"

"Attacks on titles obtained through tax sales may substantively be made where the facts make it possible by attacking (1) the validity of the assessment itself, (2) by attacking the validity of the tax sale procedures which are not obliterated by the curative statutes governing and (3) by attacking the process used in the proceedings.

"All of these lines of attack have the common bond of jurisdiction which when upheld, either singularly or collectively, create a void tax sale. All too frequently they are intertwined, in the Court decisions creating some confusion in the cases. The plaintiff has made her case for a void assessment and failing a void assessment for failure in the procedures followed in the tax sale procedure itself under W. Va. Code Ch. 11A, Art. 4, et seq. (Michie

1966). Now follows a discussion of the last major substantive issue of due process and its meaning to this case.

"Perhaps the most ringing debate in suits to set aside tax sales either at the sheriff's sales or Deputy Commissioner's sales has revolved around the matter of "notice" to the true owner. This, no doubt, stems from the inherent part of the organic law of West Virginia and of the United States of America requiring that an individual should have notice of any proceeding which affects his life, liberty or property."

"Sec. 1 of the Fourteenth Amendment to the United States Constitution states in part:"

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

"The Plaintiff is asking only that she be given equal protection of the law in her property rights as has been extended to the field of freedoms of the individual in recent times."

The discussion of Due Process in this brief is contained on p.p. 55 to 74, both inclusive.

This issue of Due Process was again referred to in the reply of the Appellant, Cecle G. Pearson, dated October 30, 1971,

which was filed October 29, 1971. Both of the previously referred to briefs have been forwarded to this Court by the Clerk of the Circuit Court of Kanawha County, West Virginia, on May 26, 1976, pursuant to a letter by the undersigned dated May 25, 1976, copy attached. These briefs are both part of the original record in this matter pursuant to W. Va. Rules of Civil Procedure, Rule 5 (e) as follows:

> "(e) Filing with the Court Defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, who shall note thereon the filing date, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk; the notation by the clerk or the judge of the filing date on any such paper constitutes the filing of such paper, and such paper then becomes a part of the record in the action without any order of the court."

The Court of first instance in its letter memorandum of opinion dated April 17, 1972, ruled adversely to the Appellant's position with regard to the Due Process issue. This opinion and the particular reference to Due Process in the opinion of the Court of first instance is found on page 35A of the Jurisdictional Statement.

The issue was again continued with the court of first instance in a motion to set aside judgment, which was filed June 21, 1972, and overruled June 21, 1972, by order. Under Paragraph 5 of that motion it states: "5. Moves the Court to amend its findings of fact and conclusions of Law as hereinbefore set out in that Due Process was not afforded the

Plaintiff in the tax sale proceedings under the W. Va. Code" (see p.p. 268-273 record).

The next opportunity to present the due process issue was afforded in the petition seeking an appeal, writ of error and supersedeas to the judgment of the Circuit Court of Kanawha County, West Virginia, (see p.p. 1-14). The direct assignments of error affecting due process are to be found under the topic heading Assignment of Error, at pages 12 and 13, of the petition of appellant seeking an appeal, writ of error or supersedeas, under Paragraphs 4 and 8 as follows: "4. The Circuit Court of Kanawha County, West Virginia, erred in its findings of fact and conclusion of Law that due process was afforded the Plaintiff in the tax sales proceedings under the W. Va. Code." "8. The Circuit Court of Kanawha County, West Virginia, erred in its refusal, upon motion, to set aside its judgment order of June 19, 1972, and to award a new trial."

The Due Process issue was further supported in the note of argument on behalf of Cecle G. Pearson filed in support of the petition seeking an appeal, writ of error or supersedeas under the 4th topic under Assignment of Error, p.p. 16-25.

Appellant in her brief before the Supreme Court of Appeals of West Virginia, dated August 14, 1973, and duly filed in that Court further discussed the Due Process issue at great length. This issue was primarily discussed, p.p. 73-93 of this brief.

This issue was again strongly referred to in the Appellant's

reply brief in the Supreme Court of Appeals in West Virginia, dated September 14, 1973.

Copies of all the briefs filed in the Supreme Court of Appeals of West Virginia, on behalf of Cecle G. Pearson, are to be filed with this Court no later than June 1, 1976, pursuant, to a request by the undersigned to the Hon. George W. Singleton, Clerk of the Supreme Court of Appeals, of West Virginia, copy attached. The opinion of the Supreme Court of Appeals of West Virginia, filed December 18, 1975, which was written by the Chief Justice of the Supreme Court of Appeals of West Virginia, Charles H. Haden, II, a decision containing 15 syllabi, devoted 5 syllabi, to the problem associated with Due Process in this case. Those syllabi pertaining to Due Process are Nos. 7, 8, 9, 12 and 14. This opinion is published in the Appendix to the Jurisdictional Statement.

The issue of Due Process has again been raised in the Jurisdictional Statement previously filed in both arguments.

In each and every step of the way where it was procedurally appropriate under West Virginia Rules of Civil Procedure, and the custom of practice before the Courts governed thereby, the Appellant herein raised this question of Due Process in the proper manner, and when overruled makes specific reference to the Due Process issue in order to preserve and save the issue for its potential and ultimate presentation before this Court.

III.

With regard to the second issue presented in the JURISDICTIONAL STATEMENT: "West Virginia Code, 11A-3-8, Denies Due Process of Law to an owner whose property interest has been sold at a Tax Sale when Statute is invoked to Bar the Owner from Attacking the Validity of the Sale", the Appellant is compelled to make the two following observations with regard to the raising of this issue:

1. This issue was raised by the West Virginia Supreme Court of Appeals in an opinion dated December 18, 1975. This issue which the appellant strongly resists as a valid issue, but one raised by the West Virginia Supreme Court of Appeals, as the blocking issue enabling it to refrain from deciding the first issue, was never before the court of first instance at all. The Appellees did not raise this issue as a valid defense in their respective answers as is pointed out on page 11 of the jurisdictional statement of Appellant. If this issue, which is in the nature of a Statute of Limitations, although called a Statutory Entitlement, was to have been raised, it should have been properly raised by the Appellees in the initial pleadings, as this issue (statutory entitlement) is no more than a contrived statute of limitations (something which must be affirmatively pleaded according to the West Virginia Rules of Civil Procedure - see: Jurisdictional Statement), which is used to throw a roadblock in front of a meaningful decision on this most important issue, the main Due Process issue, second presented

in this supplemental brief.

2. Since this issue was never presented before the decision by the West Virginia Supreme Court of Appeals, on December 18, 1975, it was impossible for the Appellant to respond, until the presentation of the jurisdictional statement before this Court. This issue, unlike the first issue which it was the duty of the Appellant to raise and which the record more than clearly illustrates, was carefully and dutifully raised, was not the responsibility of Appellant to raise, but was the responsibility of the Appellees to raise. In this particular instance, however, the appellees were afforded the assistance of the West Virginia Supreme Court of Appeals, when the court developed this issue without the insistence of the Appellees.

With due respect for the record, and with further respect for the question that may be raised as it was in the per curiam opinion of this court in the case of Paschall v. Christie-Stewart, Inc. 414 U. S. 100 (1973), (incidentally a case that is once again before this court on a writ of Certiorari, No. 75-1435), this second issue, as raised by the West Virginia Supreme Court of Appeals, may be found by this Court as it was in Paschall v. Christie, to be premature. It is not a premature issue for the reason that this issue, regardless of its initial integrity, has been ruled on by the highest tribunal of the State of West Virginia, that this ruling has been vigorously questioned by the Appellant herein, and that there is no justification for sending

this issue back to a lower jurisdiction for further deliberation, as was done in the Christie case.

CONCLUSION

It would have been impossible for the Appellant to raise Due Process in any other part of the Proceeding or in another suit. The Appellant had no Notice of the Sheriff's sale in 1962, until after the conclusion of the Deputy Commissioner's sale in 1966. It would have been pointless to have attacked the Sheriff's sale to the State in this proceeding as being violative of Due Process because the sale procedure had already progressed through to the second sale, the Deputy Commissioner's sale. This was the sale to attack and the Due Process case proceeded on that basis.

With this supplement to the Jurisdictional Statement the Appellant expresses her appreciation to the Court for requesting this additional information.

Respectfully submitted,

Philip G. Terrie

Philip G. Terrie
1009 Security Building
Charleston, West Virginia 25301

Counsel for Appellant

AFFIDAVIT OF SERVICE OF SUPPLEMENTAL BRIEF TO JURISDICTIONAL STATEMENT

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, TO-WIT:

I, PHILIP G. TERRIE, attorney for Cecle G. Pearson, Appellant herein, depose and say that on the 28th day of May, 1976, I served two copies of the foregoing Supplemental Brief to Jurisdictional Statement to the Supreme Court of the United States upon W. P. Dodd and Ernestine Dodd, his wife, Appellees herein, by delivering the same to William E. Hamb, counsel of record for said W. P. Dodd and Ernestine Dodd, at his office at 950 Kanawha Boulevard, East, Charleston, West Virginia 25301, and, further, that I served two copies of the foregoing Supplemental Brief to Jurisdictional Statement to the Supreme Court of the United States upon Columbia Gas Transmission Corporation, Appellee herein, by delivering the same to William Roy Rice, counsel of record for said Columbia Gas Transmission Corporation, at his office at 1700 MacCorkle Avenue, S. E., Charleston, West Virginia 25304.

Philip G. Terrie

Subscribed and sworn to before me by Philip G. Terrie, at Charleston, West Virginia, this 28th day of May, 1976.

My commission expires September 24, 1978.

Mary C. Matheny
Notary Public in and for
Kanawha County, West Virginia

May 25, 1976

George W. Singleton, Clerk
West Virginia Supreme Court of Appeals
State Capitol
Charleston, West Virginia 25305

Re: Cecle G. Pearson v. W. P. Dodd, et al.

Dear Mr. Singleton:

Hon. Michael Rodak, Jr., Clerk of the Supreme Court of the United States, has requested that the Appellant in the subject action, Cecle G. Pearson, my client, furnish certain information to the Court as outlined in his letter to me dated May 21, 1976, a copy of which letter is attached hereto, relating to Rule 15-1 (d), of the Court.

In order that I may comply with this request, I respectfully ask you to furnish immediately to Mr. Rodak, the Briefs filed on behalf of the Appellant before the W. Va. Supreme Court of Appeals.

Sincerely,

Philip G. Terrie

PGT:em

Enclosure

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

May 21, 1976

Philip G. Terrie, Esq.
1009 Security Building
Charleston, West Virginia 25301

Re: Cecle G. Pearson v. W. P. Dodd, et al.
No. 75-1318

Dear Mr. Terrie:

The appellant in the above-entitled case is requested to inform the Court at the earliest opportunity, but no later than June 1, 1976, whether the validity of the 1962 sale to the State of the subject property was challenged in the state courts under the Due Process Clause of the United States Constitution and, if so, to "specify the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of error) as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court." See Rule 15-1-(d).

The appellees may reply prior to June 10, 1976.

Very truly yours,

Michael Rodak, Jr.
Clerk

cc: William E. Hamb, Esq.
William Roy Rice, Esq.

May 25, 1976

Phyllis J. Rutledge
Circuit Clerk of
Kanawha County
Charleston, West Virginia

Re: Cecle G. Pearson v. W. P. Dodd, et al.

Dear Mrs. Rutledge:

Hon. Michael Rodak, Jr., Clerk of the Supreme Court of the United States, has requested that the Appellant in the subject action, Cecle G. Pearson, my client, furnish certain information to the Court as outlined in his letter to me dated May 21, 1976, a copy of which letter is attached hereto, relating to Rule 15-1 (d), of the Court.

In order that I may comply with this request, I respectfully ask you to furnish immediately to Mr. Rodak, the Briefs filed on behalf of the Appellant before the W. Va. Supreme Court of Appeals.

Sincerely,

Philip G. Terrie

PGT:em

Enclosures

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

May 21, 1976

Philip G. Terrie, Esq.
1009 Security Building
Charleston, West Virginia 25301

Re: Cecle G. Pearson v. W. P. Dodd, et al.
No. 75-1318

Dear Mr. Terrie:

The appellant in the above-entitled case is requested to inform the Court at the earliest opportunity, but no later than June 1, 1976, whether the validity of the 1962 sale to the State of the subject property was challenged in the state courts under the Due Process Clause of the United States Constitution and, if so, to "specify the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of error) as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court." See Rule 15-1-(d).

The appellees may reply prior to June 10, 1976.

Very truly yours,

Michael Rodak, Jr.

Michael Rodak, Jr.
Clerk

cc: William E. Hamb, Esq.
William Roy Rice, Esq.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1318

CECLE G. PEARSON,

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Appellees.

ON APPEAL FROM A DECISION OF THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA

Supplemental Response by Appellee to Supplemental Brief by Appellant, concerning the requirements of Rule 15-1-(d).

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Columbia Gas Transmission
Corporation

June 4, 1976

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1318

CECLE G. PEARSON,

Appellant

versus

W. P. DODD; ERNESTINE DODD,
his wife; and COLUMBIA GAS TRANSMISSION
CORPORATION,

Appellees.

ON APPEAL FROM A DECISION OF THE
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Supplemental Response by Appellee to Supplemental Brief by Appellant, concerning the requirements of Rule 15-1-(d).

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Counsel for Appellee,
Columbia Gas Transmission
Corporation

June 4, 1976

SUPPLEMENTAL RESPONSE

In response to a request to Appellant for further information relating to Due Process made by the Clerk of the Court on May 21, 1976, under Rule 15-1-(d), the Appellant has filed and served a document denominated "Supplemental Brief . . . relating to Due Process". In reply thereto, this Appellee submits the following:

In the Supplemental Brief, Appellant has gone far beyond the request directed to her under Rule 15-1-(d). Extraneous to the requirements of that Rule, and beyond the Clerk's request for compliance therewith, the Appellant cites Paschall v. Christie-Stewart, Inc., 414 U.S. 100 (1973), and argues on the basis of that case, that there is no justification for sending this case back to the lower court for further deliberation.

This Appellee concurs in the assertion that there is no justification for remanding this case to the Supreme Court of Appeals of West Virginia for any further proceedings.. However, the authority of Paschall, and the authority therein cited, have an entirely different effect than that contended for by Appellant. A comparison of Paschall with the present appeal by Pearson is both necessary and determinative. The rule of Paschall requires the dismissal of this appeal.

In Paschall, the former owner of real estate brought a suit to quiet title as against the purchaser at a tax sale. The trial of the case involved issues of due process and a statute of limitations, and the trial court upheld the Oklahoma statutes on both issues. On the issue of due process, the Oklahoma Court of Appeals reversed the trial court. However, the Supreme Court of Oklahoma overruled the Court of Appeals on the issue of due process. Upon appeal to the United States Supreme Court, this Court, observing that it had probable jurisdiction on the authority of Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), remanded Paschall to the Supreme Court of Oklahoma to determine whether, under state law, the statute of limitations independently barred Appellant's attack on the tax title. If that should prove to be the case, this Court observed, any decision by this Court would be advisory and beyond its jurisdiction, citing Murdock v. City of Memphis, 20 Wall. 590 (1875).

What, then, is the decisive meaning of Paschall on the present appeal? In Pearson, now before the Court, the former real estate owner (Appellant) brought a suit to quiet title as against the purchaser (Appellee Dodd) at a tax sale. The trial court upheld the West Virginia statutes in all respects, including the issue of due process which had been raised early-on. Upon appeal from the trial court, the Supreme Court of Appeals of West Virginia upheld the lower court on the issue

of due process and, further, held that the attack on the tax sale was barred by the statutory entitlement (i.e., a statute of limitations), pursuant to the provisions of Code, 11A-3-8. This is conceded by the Appellant in the Supplemental Brief (at page 8).

The Appellant asserts that this Court has probable jurisdiction on the authority of Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). That issue has been fully discussed in Appellant's Jurisdictional Statement and in this Appellee's Motion to Dismiss or Affirm.

Following the Paschall case, this Appellee submits that there can be no remand to the Supreme Court of Appeals of West Virginia: under the law of the State of West Virginia, it has already been determined that the statutory entitlement (i.e., a statute of limitations) independently bars Appellant's claim. As this Court observed in Paschall, any decision by this Court would be advisory only and beyond its jurisdiction, citing Murdock v. City of Memphis, 20 Wall. 590 (1875).

For more than 100 years, the applicable rule of law has been, and remains, as stated in Murdock:

> "5. If it [this Court] finds that it [the constitutional question] was rightly decided, the judgment must be affirmed."
>
> "6. If it [the constitutional issue] was erroneously decided against plaintiff in error, then this court must further inquire, whether there is any other matter or issue adjudged by the State Court,

> which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue." (22 L.Ed. 429, 444).

The Supreme Court of Appeals of West Virginia held in its decision in the Pearson case, based on previous decisions of local law in West Virginia:

> "It is our belief, and we so hold, that [under *Code*, 11A-3-8, *supra*] a former owner possesses a statutory entitlement, i.e. a right to redeem at any time within eighteen months of the date of the State purchase. If, however, redemption does not occur during this period, then the statutory entitlement no longer exists because absolute title has vested in the State. Only at this latter point in time is the State permitted by *W.Va. Const.*, Art. XIII, §§ 3 and 4 to institute a suit to sell lands for the school fund. *State v. Gray*, 132 W.Va. 472, 52 S.E.2d 759 (1949); *State v. Blevins*, 131 W. Va. 350, 48 S.E.2d 174 (1948); *State v. Farmers Coal Co.*, 130 W.Va. 1, 43 S.E.2d 625 (1947)". (App. at 20A).

Irrespective of whether the issue of due process was correctly decided (Appellee's position is that it was correctly decided), this Appellee submits that the judgment of the Supreme Court of Appeals of West Virginia is sufficiently broad in its ruling that Code, § 11A-3-8 independently bars Appellant's claim and that the judgment must be now affirmed without further inquiry into the due process issue.

CONCLUSION

With this Supplemental Response, this Appellee, Columbia Gas Transmission Corporation, respectfully submits that the decision of the Supreme Court of Appeals of West Virginia is clearly correct; that this appeal does not present a substantial federal question; that the judgment below rests on an adequate non-federal basis; and, that this Court should dismiss this appeal and affirm the decision below.

Respectfully submitted,

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Of Counsel

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June 4, 1976

AFFIDAVIT OF SERVICE OF
SUPPLEMENTAL RESPONSE BY APPELLEE
TO SUPPLEMENTAL BRIEF BY APPELLANT

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, TO-WIT:

I, THOMAS E. MORGAN, attorney for Columbia Gas Transmission Corporation, Appellee herein, depose and say that on the 4th day of June, 1976, I served three copies of the foregoing Supplemental Response By Appellee to Supplemental Brief by Appellant upon Cecle G. Pearson, Appellant herein, by depositing the same in a United States post office or mail box, with first class postage prepaid, addressed to Philip G. Terrie, counsel of record for said Cecle G. Pearson, at 1009 Security Building, Charleston, West Virginia 25301; and, further that I served three copies of the foregoing Supplemental Response by Appellee to Supplemental Brief by Appellant upon W. P. Dodd and Ernestine Dodd, his wife, Appellees herein, by depositing the same in a United States post office or mail box, with first class postage prepaid, addressed to William E. Hamb, counsel of record for said W. P. Dodd and Ernestine Dodd, at his office at 950 Kanawha Boulevard, East, Charleston, West Virginia 25301.

Thomas E. Morgan

Subscribed and sworn to before me by Thomas E. Morgan, at Charleston, West Virginia, this 4th day of June, 1976.

My commission expires May 18, 1981.

Sue Kisker

Notary Public in and for
Kanawha County, West Virginia
(Commissioned as Sue Walker)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1318

CECLE G. PEARSON,

Appellant

versus

W.P. DODD; ERNESTINE DODD,
his wife; and COLUMBIA GAS TRANSMISSION
CORPORATION,

Appellees.

ON APPEAL FROM A DECISION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF ON THE MERITS

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BRIEF ON THE MERITS

OPINION BELOW

The opinion below by the Honorable Chief Justice Haden of the Supreme Court of Appeals of West Virginia is reported at 221 S.E.2d 171 (W. Va. 1975). A copy of the opinion is set out in full in Appendix A, Jurisdictional Statement.

The judgment of June 19, 1972, by the Honorable Frank L. Taylor, Judge of the Circuit Court of Kanawha County, West Virginia, incorporated Judge Taylor's letter memorandum of opinion of April 17, 1972. A copy of that judgment and opinion is set out in full in Appendix B, Jurisdictional Statement.

JURISDICTION

The suit is one to set aside as a cloud upon the title to an oil and gas interest a purported conveyance of such interest by a tax deed under a state statute. The judgment of the Supreme Court of Appeals of West Virginia was filed on December 18, 1975. Notice of Appeal was filed with the Supreme Court of Appeals on February 26, 1976.

The jurisdiction of the Supreme Court to hear this appeal rests upon 28 *U.S.C.* § 1257 (2) or, in the alternative, § 1257 (3). This Court noted probable jurisdiction on June 21, 1976.

STATUTES INVOLVED

The case involves the validity of West Virginia Code 1931, §§ 11A-4-12 and 11A-3-8. These statutes are set out in Appendix C, Jurisdictional Statement.

QUESTIONS PRESENTED

The questions presented by this appeal are:

(a) whether a state statute, which permits notice of a tax sale solely by a publication naming the interested person as an unknown defendant, notwithstanding that the person's name and address are known or very easily ascertainable contravenes the requirements of due process of law embodied in the Fourteenth Amendment to the United States Constitution; and

(b) if such notice is constitutionally deficient, whether a state violates due process guarantees where it invokes a statute of limitations to bar such person from attacking the validity of the sale.

STATEMENT OF THE CASE

By a deed from her son, H.C. Pearson, Jr., executed and recorded in 1937, the appellant, Cecle G. Pearson, acquired a full one-fourth interest in all of the oil and gas in sixty-eight acres of land located in Kanawha County, West Virginia. Although the entry in the land books was not changed from her son's name to her own, appellant's husband paid the real estate taxes on her interest from the time of the first assessment in 1938 until 1960. No taxes were paid on appellant's interest in 1961. As a result of this nonpayment, the assessment on appellant's interest was declared delinquent in 1962.

In 1966, the Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County instituted a suit in the name of the State of West Virginia for the sale of this and other delinquent interests in real property. On April 26 of that year, the Deputy Commissioner purported to convey by a tax deed to appellee W.P. Dodd "68 Acres, 1/8 Acre Oil and Gas Interest . . . being the same property conveyed to H.C. Pearson, Jr. . . . " In 1967, Mr. Dodd and his wife ratified an existing lease upon the sixty-eight acres executed in favor of the United Fuel Gas Company and granted United the right to drill a natural gas well. A well was completed on this interest in 1968 and produced an initial open flow of one hundred million cubic feet of gas. Under the terms of the lease, the lessors were each entitled to "their proportionate part of one-eighth of the wholesale market value" of the gas produced. Appellant was not a party to this lease.

On July 26, 1968, Mrs. Pearson paid the State Auditor $101.86 and received a Certificate of Redemption of Lands in her name for "68A, 1/4 O & G Interest" in the property in question. She subsequently filed this suit against the Dodds and United Fuel. By an order of the Circuit Court dated July 9, 1971, appellee Columbia Gas Transmission Corporation was substituted as a defendant for United Fuel.

West Virginia Code § 11A-4-12 permits the sale of delinquent property interests upon notice by publication upon "unknown parties who are or may be interested in any of the lands included . . . . " The only notice of the sale in question was given by publication in two local newspapers on April 16 and April 23, 1966. This notice mis-described the interest as "68 Acres, 1/8 Acre Oil and Gas Interest" and listed the former owner as H.C. Pearson, Jr. The record owner was the Appellant, Cecle G. Pearson.

The Circuit Court granted judgment for the defendants-appellees. In its letter memorandum of opinion, it held, *inter alia*, that the notice provisions of § 11A-4-12 did not deny the plaintiff-appellant due process of law under the United States Constitution. In affirming the judgment of the Circuit Court, the Supreme Court of Appeals of West Virginia held "that the former owner is not such an interested party in the circuit court sale to invoke the constitutional protections" of procedural due process. The court reached this conclusion by application of West Virginia Code 1931, § 11A-3-8, holding that an owner who failed to redeem her property within the statutory period provided by the section lost all rights of ownership, and hence lost any "significant property interest" sufficient to support a due process challenge. Section 11A-3-8, by its terms, permits the owner of property acquired by the state for disposition at a tax sale to redeem his property within eighteen months of the acquisition by the state.

The general issue of due process contained in the first agrument, *infra*, was raised by the appellant at the earliest possible opportunity and strongly asserted and briefed

throughout the proceedings below. *See* Memorandum of Law filed by appellant in the Circuit Court of Kanawha County, West Virginia, on August 16, 1971, pp. 55-74; Reply of Appellant, filed October 29, 1971; Motion To Set Aside Judgment, filed June 21, 1972 and overruled June 21, 1972; Petition seeking appeal, writ of error and supersedeas to the judgment of the trial court, pp. 1-14; Brief on Behalf of Appellant before the Supreme Court of Appeals of West Virginia, dated August 14, 1973, pp. 73-93; Appellant's Reply Brief in the Supreme Court of Appeals of West Virginia, dated September 14, 1973.

The second issue presented by this appeal, namely, whether the West Virginia statutory limitation on actions to contest a tax sale denies due process, arose for the first time in the final opinion of the West Virginia Supreme Court of Appeals. The statutory limitation was never raised by the appellees at any point in the proceedings, even though the West Virginia Rules of Civil Procedure require that a statute of limitations must be affirmatively pleaded. Hence, it was impossible for the appellant to respond to the statutory limitation until the filing of her Jurisdictional Statement with this Court.

ARGUMENT

I. WEST VIRGINIA CODE § 11A-4-12 VIOLATES THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN THAT IT PERMITS NOTICE SOLELY BY PUBLICATION TO FORMER OWNERS IN A TAX SALE, EVEN WHERE THE OWNER'S NAME AND ADDRESS ARE KNOWN OR EASILY ASCERTAINABLE.

In Part IV of his opinion for the West Virginia Supreme Court of Appeals, Chief Justice Haden implicitly recognized, in the absence of a statute of limitations, the constitutional deficiency of § 11A-4-12 as applied to the appellant under the test announced in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950):

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

More particularly, this Court held in *Mullane* that mere publication notice in a local newspaper is not sufficient with respect to an individual whose name and address are known or easily ascertainable. *See Robinson v. Hanrahan*, 409 U.S. 38, 40 (1972). *Mullane* stressed that the adequacy of notice in a given action is not determined by classifying the action as in rem or in personam. Instead, the distinguishing feature of inadequate notice is "not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand." 339 U.S. at 319.

This balancing test proposed in *Mullane* has been broadly applied in later cases. A right to adequate personal notice has been recognized in deprivation of property cases due to eminent domain proceedings. *Schroeder v. City of New York*, 371 U.S. 208 (1962); *Walker v. City of Hutchinson*, 352 U.S. 112 (1956). Personal notice has been required in bankruptcy proceedings. *City of New York v. New York, N.H. & H.R.R.*, 344 U.S. 293 (1953), and in cases of automobile forfeiture. *Robinson v. Hanrahan*, 409 U.S. 38 (1972). *See also Wisconsin Electric Power Co. v. City of Milwaukee*, 352 U.S. 948 (1956); *Covey v. Town of Somers*, 351 U.S. 141 (1956).

Two recent decisions by this Court rejected state statutory notice provisions in favor of notice designed to be more certain to reach interested parties. In *Covey v. Town of Somers*, 351 U.S. 141 (1956), notice of a tax sale by publishing, posting and mailing to a known incompetent was held a violation of due process. In *Robinson v. Hanrahan*, 409 U.S. 38 (1972), notice of an automobile forfeiture proceeding by certified mail addressed to an

owner's home was held unconstitutional because the state knew the owner was being held in the county jail. In both *Covey* and *Robinson*, this Court sought to determine the procedure which would provide the best notice to the property owner under the circumstances. In tax sale proceedings, it is clear that publication notice alone is not an adequate means of informing property owners that their land is being taken away. In light of *Mullane* and its progeny, the traditional state interests can no longer be held to outweigh the interests of the soon-to-be deprived property owner. Where the owner's name and address are known or easily ascertainable from county records, mailed personal notice must be deemed necessary for the tax sale procedure to comport with the due process clause of the Fourteenth Amendment.

Commentators have noted that the above conclusion is logically required if the Mullane doctrine is applied uniformly and consistently:

> In almost every tax sale case the name and address of the property owner will be readily ascertainable, either from the tax roles, the county land records, or otherwise. A direct application of the *Mullane* doctrine would lead to the conclusion that notice by publication alone is unconstitutional and that some form of personal notice by mail must be provided.

Note, "The Constitutionality of Notice by Publication Tax Proceedings," 84 *Yale L. J.* 1505, 1511 (1975); *accord*, Note, "Due Process in Tax Sales in New York: The Insufficiency of Notice by Publication," 25 *Syracuse L. Rev.* 769, 775 (1974); Legg, "Tax Sales and the Constitution," 20 *Okla. L. Rev.* 363, 375 (1967).

Two recent decisions by state courts have also reached the conclusion that landowners whose property interests are sold at a tax sale are denied due process when the only notice of the sale is by publication. In *Johnson v. Alma Investment Co.*, 47 Cal. App. 3d 155, 120 Cal. Rptr. 503 (1975), the owners, who had lived at the same address

since 1951, purchased property in 1962 which was subject to assessment by the local water district. When the district's assessment roll was compiled in 1964, the owners' address did not appear since names and addresses of property owners were obtained from the tax roll of the county tax assessor. At that time the tax roll failed to carry the owners' address, although the address was carried on the records of the tax *collector* as early as 1963.

As a result, the water district assessment was declared delinquent by way of notice, pursuant to a state statute, solely by publication. The property was subsequently sold at a tax sale and the owners brought suit to quiet title against the purchasers. The court of appeal held that to the extent that the code section authorized notice of assessment by publication alone, where the address of the owner was known or could be ascertained with reasonable diligence, the section was constitutionally deficient as a denial of due process to the owners. Since, when the water district assessment roll was compiled, the address of the owners was available from the county tax collector's records, the address was ascertainable with reasonable diligence, and the sale of the property was void.

The circumstances in the present case are similar to *Johnson*, but even more compelling. At the time of the tax sale, the appellant had lived at the same address for nearly twenty years. (A. 38,52). The interest had been recorded in her name since the execution of the deed in 1937. Moreover, the published notice completely omitted the appellant's name as well as her address, and the property interest was described incorrectly. An incomplete and accurate notice such as this was certainly not "reasonably calculated, under all the circumstances" to alert the appellant that her property was about to be forfeited for a tax deficiency.

Another recent decision by a state court held void as a violation of due process a tax sale of mineral interests where the only notice of sale, pursuant to a state statute, was by publication. *Chapin v. Aylward*, 204 Kan. 448, 464

P.2d 177 (1970). The Supreme Court of Kansas, applying the *Mullane* test, held that although neither the mineral deed nor the records in the county treasurer's office gave the address of the owners, notice by publication was insufficient where the address could have been discovered from the personal property tax or real estate tax rolls.

In the instant case, the name and address of the owner-appellant either were known to the deputy commissioner when he instituted a suit for the sale of appellant's property or were easily ascertainable from the county records. Therefore, in view of the due process requirements articulated in *Mullane* and endorsed and extended by subsequent decisions of this Court and state courts, it is patently clear that the notice provisions of the West Virginia statute violate the due process clause of the Fourteenth Amendment.

II. WEST VIRGINIA CODE § 11A-3-8 DENIES DUE PROCESS OF LAW TO AN OWNER WHOSE PROPERTY INTEREST HAS BEEN SOLD AT A TAX SALE WHEN THE STATUTE IS INVOKED TO BAR THE OWNER FROM ATTACKING THE VALIDITY OF THE SALE.

The second argument of this appeal presents this Court with the precise issue found not to be present in *Paschall v. Christie-Stewart, Inc.*, 414 U.S. 100, 102 n. 4 (1973), namely "[w]hether the alleged lack of constitutionally valid notice would preclude the running of the statute of limitations for an adverse claim. . . . "

The issue was directly addressed in *Chapin v. Aylward*, discussed in the preceding section. The court in *Chapin* held that the Kansas statute of limitations regarding actions to set aside a tax sale could not be invoked against owners who were denied due process of law by the exclusive use of publication notice. This conclusion is hardly novel; in fact, the *Chapin* holding, rendered in 1970, finds support in the legal literature of the turn of the century. A commentator during the 1890's remarked upon the potentially injurious effects of statutory limitations on contesting tax

sales, using language equally applicable to the statutes in *Chapin* and the present case:

> In most, if not all, of the American states there are upon the statute books laws which limit the right of the former owner of land sold for taxes to bring his action to test the validity of the tax title, to a much shorter period than that prescribed by the common law for the trial of titles to land. . . . [T]hey have been so worded that if applied literally, they would make a tax title entirely impervious to attack, after the lapse of the given period, no matter what irregularities or defects may undermine it, and irrespective of the fact of possession or any of the other circumstances thought material in such cases. Notwithstanding the large control of the legislature over remedies and over the limitation of actions, it may well be doubted whether such a result can lawfully be accomplished in all cases.

H. Black, A Treatise on the Law of Tax Titles § 492 (2d ed. 1893).

> In the words of another observer: A statute . . . which should make a tax-deed conclusive evidence of a complete title, and preclude the owner of the original title from showing its invalidity, would be void, because being not a law regulating evidence, but an unconstitutional confiscation of property.

T. Cooley, A Treatise on the Constitutional Limitations 769 (8th ed. R. Carrington 1927).

In light of the above commentaries, it is hardly surprising that there is considerable precedent dating back over a century for the principle being urged here, *i.e.*, that due process will not permit a state statute of limitations to bar a challenge to the validity of a tax sale. In perhaps the earliest of these decisions, *Groesbeck v. Seeley*, 13 Mich. 329 (1865), the holder of a tax deed brought an action in ejectment against the property owners who offered to show in defense that the taxes for which the lands had been sold were illegal for noncompliance with the statutes. The

trial court had barred this defense under the limitations provision of the tax laws. The appellate court held the provision to be invalid as so applied, recognizing the import of a contrary holding:

> If this tax title can be thus made indefeasible against a title in possession, by mere lapse of time, it might as well have been declared so originally It would in either case be nothing more nor less than depriving one of his property without any legal process, and is simply confiscation by ministerial and not judicial action.

13 Mich. at 344.

A similar case came before the high court of a sister state in the following year. *Baker v. Kelley*, 11 Minn. 480 (1866), was an action of ejectment by the landowner against the purchaser of a tax deed who had entered onto the land. The trial court held that the plaintiff landowner's right to demonstrate the invalidity of the tax deed had been lost because the plaintiff did not act within the one year statutory limitation period. The Minnesota Supreme Court reversed, holding that the statute of limitations was void, since the legislature could not require a person who was in possession of his property to commence an action for the purpose of vindicating his rights. The court stated:

> It follows that a law which, by its own inherent force, extinguishes rights of property or compels their extinction without any legal proceedings whatever, comes directly in conflict with the Constitution.

11 Minn. at 498.

In yet another nineteenth century decision, a similar limitations provision was held to constitute a denial of due process. *Dingey v. Paxton*, 60 Miss. 1038 (1883), involved an action for ejectment by a plaintiff showing an unbroken chain of title against one in possession of the land under a tax deed. A state statute operated to bar the plaintiff from questioning the validity of the tax deed. The court, in declaring the statute invalid, stated that the legislature

cannot create the necessity for suit by converting a possessory estate into a mere right of action and then limiting the time in which the suit could be brought:

> When the effect of . . . legislation is to transfer property without the assent of the owner, and vest it in another, it offends not only natural justice, but against that clause in our Constitution, by which the citizen is protected against loss of property except by due process of law.

60 Miss. at 1057. The court reasoned that since the landowner was in constructive possession of his land and had the legal right to possession, he was in enjoyment of all that the law could give him. He could not be disturbed in such enjoyment except by due process of law, and the attempt to divest him of his title by mere legislative decree did not comport with due process. 60 Miss. at 1055.

The principles underlying the *Dingey* holding were affirmed more recently in *Leavenworth v. Claughton*, 197 Miss. 606, 20 So. 2d 821 (1945). There, a statute limited to two years a property owner's right to challenge a subsequent tax deed to his property. The court held the statute unconstitutional as "an effort at forced conveyance by legislative fiat. That is not due process of law." 20 So. 2d at 822. In *Murrison v. Fenstermacher*, 166 Kan. 568, 203 P.2d 160 (1949), a similar one-year limitation statute was held to violate constitutional due process. The court's reasoning was based on the following principle:

> [A] statute cannot be sustained as one of limitation when it requires a party in full possession and enjoyment of his property to bring an action within a given time or else forfeit it. A person in the possession of property cannot be required under penalty of forfeiture to bring an action against one claiming an adverse interest or title to such property.

203 P.2d at 165.

In the instant case, the defendants-appellees did not

even raise the issue of a statutory limitation under § 11A-3-8. Instead, the West Virginia Supreme Court of Appeals introduced the issue for the first time in its opinion of December 18, 1975. The court in effect pleaded the statute on behalf of the appellees, notwithstanding the clear requirement of West Virginia Rules of Civil Procedure No. 8 (c) that a party must plead any defense based on a statute of limitations.

> 8 (c) *Affirmative Defenses.* In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, *statute of limitations*, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation. (emphasis supplied).

The appellate court below completely disregarded this procedural rule and attempted on its own to overcome the Appellee's failure to raise the issue. Such action was clearly improper and greatly prejudicial to the plaintiff-appellant.

More significant for purposes of the constitutional argument before this Court is the manner in which the statute was interpreted. By its interpretation of § 11A-3-8, the West Virginia court held that an owner of property is barred from asserting the invalidity of a tax sale by the running of a statute of limitation, a statute of limitations which runs not only *prior to the sale* but prior to the time it is possible to bring the suit on which the sale is predicated. W. Va. Code 11A-4, et. seq. Thus, under the court's holding Mrs. Pearson was barred from asserting the invalidity of the sale even before the suit on which

the sale was predicated was instituted. The court reached this bizarre result by indulging in the fiction that the notation of a tax delinquency is a "sale" vesting title in the state thereby triggering the limitations of § 11A-3-8. That this is a fiction is indicated by *West Virginia Const.* art. 13, § 4, which provides that delinquent lands "shall . . . be sold to the highest bidder." (Emphasis added; the section is set out in full Appendix C Jurisdictional Statement.) The state's acquisition of the lands is merely one step in the process of transferring title to a tax purchaser. By the terms of § 4, the state "shall" sell land to the highest bidder; it is not empowered to retain the land for its own use.

The second argument in summary really resolves itself into three subsidiary questions.

(1) Assuming arguendo that 11A-3-8 becomes a valid statute of limitations (statutory entitlement) as far as a statute of limitations is concerned, it cannot be used to preclude the assertion of a constitutional right.

(2) Assuming arguendo that the statute of limitations is a valid proposition and can be used at the proper time to preclude the assertion of a constitutional right, in this particular case the statute of limitations created by the West Virginia Supreme Court of Appeals, ran even before the suit on which the sale sought to be set aside is predicated was authorized by statute. This statute of limitations was then used to define when a "significant property interest" existed in the Appellant. By working the statute of limitations and the "significant property interest" question together the Court created a road block to the protection of a constitutional right. In this case the road block was both summary and peremptory. If the statute of limitations ran some reasonable time after the sale was consummated this would perhaps be a different question. (Parenthetically it is to be noted at present there is no definition of "significant property interest" only the use of the term to signify a conclusion).

The running of the statute of limitations before the delinquent land suit was authorized to be initiated clearly places the sale sought to be set aside in the previously mentioned category of a ministerial function. Placing the suit on which the sale is predicated in this category makes the suit complained of a suit that is not a suit. Therefore, this becomes a void proceeding and finally leads to the ultimate conclusion that this is a law suit that is not a law suit and one that ought not to be sanctioned by the dignity of the Courts and not sanctioned by the 14th amendment to The Constitution of The United States of America.

(3) The third and most compelling point is, however, that this is not a valid statute of limitations, and hence is of no force and effect, leaving the case to rest solely on the first issue presented. No authority is needed to cite the axiom that a statute of limitations is in derogation of the common law and a statute to be narrowly construed with respect to those it is intended to benefit. In the instant case various counsel for the appellees, throughout this protracted litigation, never cited section 11A-3-8 as a statute of limitations. This is the most compelling argument in terms of a well reasoned and structured interpretation of the statutes concerning delinquent land sales in West Virginia. The main question then presented is the original issue, that of Due Process, treated under the first major issue, herein.

An adversary relationship is the essential ingredient to a law suit, a relationship which is absent in the interpretation complained of by the West Virginia Supreme Court of Appeals.

This egregious error must be corrected for the benefit of the sanctity of the Judicial Process regardless of the potential consequences that may result from such a decision.

Thus, the West Virginia interpretation violates due process guarantees even more flagrantly than the authorities cited

earlier. Not only does it disregard the long established principle that a state statute denies due process when it bars a former owner from challenging the validity of a tax sale;, West Virginia has carried this violation one step further by asserting that a state may bar a property owner from asserting the constitutional defect even before the sale has occurred. By this interpretation, the West Virginia court has placed a virtually insurmountable burden on persons in the position of the appellant. Such a burden is, in principle and on the authorities, in utter disregard of the Fourteenth Amendment guarantee that no state shall deprive any person of property without due process of law.

CONCLUSION

The West Virginia statutes have been applied by the Supreme Court of Appeals of that state to deny the appellant due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. This Court should review and reverse the decision below.

Respectfully submitted,

s/Philip G. Terrie
1009 Security Building
Charleston, West Virginia 25301

Counsel for Appellant

AFFIDAVIT OF SERVICE OF APPELLANT'S BRIEF ON THE MERITS

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, TO-WIT:

I, PHILIP G. TERRIE, attorney for Cecle G. Pearson, Appellant herein, depose and say that on the 4th day of August, 1976, I served three copies of the foregoing Appellant's Brief On The Merits to the Supreme Court of the United States upon W. P. Dodd and Ernestine Dodd, his wife, Appellees herein, by depositing the same in a United States Post Office or mail box with first class postage prepaid, addressed to William E. Hamb, counsel of record for said W. P. Dodd and Ernestine Dodd, his wife, at his office at 950 Kanawha Boulevard, East, Charleston, West Virginia 25301, and, further, that I served three copies of the foregoing Appellant's Brief On The Merits to the Supreme Court of the United States upon Columbia Gas Transmission Corporation, Appellee herein, by depositing the same in a United States Post Office or mail box with first class postage prepaid, addressed to William Roy Rice, counsel of record for said Columbia Gas Transmission Corporation, at his office at P. O. Box 1273, Charleston, West Virginia 25325, and also that I served three copies of the foregoing Appellant's Brief On The Merits to the Supreme Court of the United States upon Columbia Gas Transmission Corporation, Appellee herein, by depositing the same in a United States Post Office or mail box with first class postage prepaid, addressed to Thomas E. Morgan, counsel of record for said Columbia Gas Transmission Corporation, at his office at P. O. Box 1273, Charleston, West Virginia 25325.

/s/ Philip G. Terrie

Subscribed and sworn to before me by Philip G. Terrie, at Charleston, West Virginia, this 4th day of August, 1976.

My commission expires September 24, 1978.

/s/ Mary C. Matheny
Notary Public in and for
Kanawha County, West Virginia

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1318

CECLE G. PEARSON,

Appellant,

v.

W.P. DODD; ERNESTINE DODD, his wife; and COLUMBIA GAS TRANSMISSION CORPORATION,

Appellees.

ON APPEAL FROM A DECISION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF ON THE MERITS

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September 3, 1976

Dunbar Printing Co., Dunbar, W. Va.

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BRIEF ON THE MERITS

In this Brief on the Merits, Columbia Gas Transmission Corporation, Appellee (including its predecessor, United Fuel Gas Company) will be referred to as "Columbia" and the Appellee, W. P. Dodd (a defendant below and the purchaser of Pearson's title at the tax-sale) will be referred to as "Dodd". Appellant, Cecle G. Pearson (the plaintiff below) will be referred to as "Pearson".

OPINIONS BELOW

The opinion below by Chief Justice Haden of the Supreme Court of Appeals of West Virginia is reported at 221 S.E.2d 171 (W. Va. 1975). A copy of the opinion below is set out in full in Appendix A, appended to Appellant's Jurisdictional Statement.

The judgment of June 19, 1972, by the Circuit Court of Kanawha County, West Virginia, incorporating the Court's memorandum of opinion of April 17, 1972, is set out in full in Appendix B, appended to Appellant's Jurisdictional Statement.

JURISDICTION

The suit involved in this appeal was brought by Pearson to set aside, as a cloud upon her alleged title to an oil and gas interest, a conveyance of such interest by a tax deed made pursuant to a state statute. The judgment of the Supreme Court of Appeals of West Virginia was filed on December 18, 1975. Notice of Appeal was filed with the Supreme Court of Appeals on February 26, 1976.

The asserted jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. §1257(2), or, in the alternative, §1257(3). This Court noted probable jurisdiction on June 21, 1976.

STATUTES INVOLVED

The case involves the validity of West Virginia Code §§11A-4-12 and 11A-3-8. These statutes are set out in Appendix C, appended to Appellant's Jurisdictional Statement.

QUESTIONS PRESENTED

The questions presented for review are:

I. Do the due process requirements of the Fourteenth Amendment to the United States Constitution invalidate a West Virginia statute which permits a tax sale of real property, owned by the State, upon publication naming the former owner as a defendant and also naming, as defendants, unknown parties claiming under the former owner?

II. Do the provisions of West Virginia Code §11A-3-8 vesting title in the State to tax delinquent property, not timely redeemed, render moot any question of the adequacy of notice by publication only to the prior owner at the subsequent sale of the State's title?

III. Independent of the other questions, will due process objections justify the retroactive invalidation of innumerable long established land titles?

STATEMENT OF THE CASE

By a deed executed and recorded in 1937, Pearson acquired a one-fourth interest in all of the oil and gas in sixty-eight acres of land located in Kanawha County, West Virginia (App. 63-64). Although Pearson did not cause a change of the entry in the Land Books (the official assessment rolls for real property in West Virginia) from the former owner's name to her own, Pearson's husband paid the real estate taxes on her interest from 1938 until 1960 (App. 41). No taxes were paid on Pearson's interest in 1961. As a result of this nonpayment, in 1962 the property embraced by the assessment of Pearson's interest (an oil and gas interest) was declared delinquent and was sold to the State of West Virginia pursuant to statute (App. 53-54, 72).

In 1966, the Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County (the statutory officer of the State charged with the duty of selling delinquent and irredeemable real estate) instituted a statutory suit in the name of the State for the sale of this real property interest (App. 65-76). On June 1, 1966, in keeping with orders entered in the suit (App. 73-80, 83-88, 97-101), the Deputy Commissioner conveyed by a tax deed to Dodd (the purchaser at the Deputy Commissioner's sale), the property assessed in the name of H. C. Pearson, Jr. (App. 102). In 1967, Dodd and his wife ratified an existing lease (App. 103-105) upon the sixty-eight acres held by United Fuel Gas Company, and granted United the right to drill a natural gas well (App. 106-107). This well was completed in 1968 at a cost of $104,500.87 and produced an initial

open flow of one hundred million cubic feet of gas (App. 117-120). Columbia is the successor in interest to United (App. 49).

On July 26, 1968, Pearson paid the State Auditor $101.86 and received what was designated a Certificate of Redemption of Lands in her name for the property in question (App. 121). However, at that time, the property was irredeemable under Code §11A-3-8 and the attempted redemption was, within the statutory intention, of no effect. Pearson subsequently filed this suit against the Dodds and United (now Columbia).

West Virginia Code §11A-4-12 permits the sale of delinquent property interests previously sold to the State and irredeemable (the situation involved in this case) upon notice by publication upon "unknown parties who are or may be interested in any of the lands included . . . ." A statutorily sufficient notice of the sale in question was given by publication.

Upholding the statutory scheme for tax sales and affirming that this particular sale was in keeping therewith and in keeping with due process requirements, the Circuit Court granted judgment for the Dodds and Columbia. In its letter memorandum of opinion, it held, *inter alia,* that the notice provisions of §11A-4-12 did not deny Pearson due process of law under the State Constitution or the United States Constitution. The Supreme Court of Appeals of West Virginia affirmed the judgment of the Circuit Court against the former owner, Pearson.

SUMMARY OF ARGUMENT

Eighty years ago, *King v. Mullins,* 171 U.S. 404 (1898), held that the notice by publication provisions under the West Virginia statutory scheme for collecting real property taxes did not violate due process under the Fourteenth Amendment. Insofar as the due process question is concerned, the statutory tax collection provisions remain essentially the same.

Procedures for collecting real property taxes do not require the same kind of notice or process required in a suit at law.

Other decisions by this Court affecting Illinois, Pennsylvania, Kentucky, Nebraska and Arkansas have held likewise, substantiating no violation of due process under the Fourteenth Amendment in State notice by publication provisions under procedures for collecting real property taxes.

The State's need to collect revenue requires that an owner either pay real property taxes or lose his title to another who will pay the taxes.

A property owner who does not pay his taxes is presumed to know that the property will be sold to allow collection if the delinquency continues. In this regard, the owner of property is a caretaker who has a duty to watch published legal notices affecting his property.

The principles in *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950), do not apply in cases such as this where the names and addresses of affected parties are not at hand. However, *Mullane* does not require an impracticable and expensive title search to determine the identity of interested parties in a prospective tax deed situtation.

Decisions following the principles in *Mullane* in condemnation and other appropriation cases can be distinguished from cases where real property taxes are being collected.

This appeal does not involve a windfall to one party at the expense of another party.

West Virginia Code §11A-3-8 vesting title in the State to tax delinquent property, not timely redeemed, renders moot any question of the adequacy of notice by publication only to the prior owner at the subsequent sale of the State's title.

An independent State ground on which the decision below is based will bar attacks in this Appeal, under the doctrine of *Murdock v. City of Memphis,* 20 Wall. 590 (1875).

West Virginia Code §11A-3-8 is such independent State ground barring this Appeal.

By virtue of West Virginia Code §11A-3-8, Pearson had no significant property interest in 1966 to question the adequacy of notice by publication at the State's sale of its title.

The decisions in other state courts are not probative or determinative on the issue of due process under the Fourteenth Amendment. The decision by the highest Court in the State of West Virginia has held that due process is not denied by procedures for collecting real property taxes.

Independent of the other questions, due process objections do not justify the retroactive invalidation of innumerable long established land titles.

The desired stability of land titles requires that tax-deeds should not be upset.

Tax-deeds, like securities or municipal bonds, should not be upset in arrears but only prospectively, if at all.

ARGUMENT

I. WEST VIRGINIA CODE §11A-4-12 PERMITTING A TAX SALE OF REAL PROPERTY, OWNED BY THE STATE, UPON PUBLICATION NAMING THE FORMER OWNER AS A DEFENDANT AND ALSO NAMING UNKNOWN PARTIES CLAIMING UNDER HIM AS DEFENDANTS, DOES NOT DENY DUE PROCESS OF LAW.

Almost eighty years ago this Court directed its attention to the question once again before this Court on appeal by Pearson. In *King v. Mullins,* 171 U.S. 404 (1898), the very question now before this Court was whether the system of taxation in the State of West Virginia, and its provisions for forfeitures, were repugnant to the Fourteenth Amendment of the Constitution of the United States. In holding that the system established by the State of West Virginia is

not inconsistent with the due process of law required by the Constitution of the United States, this Court said:

> "The judiciary should be very reluctant to interfere with the taxing systems of a state, and should never do so unless that which the state attempts to do is in palpable violation of the constitutional rights of the owners of property. Under this view of our duty, we are unwilling to hold that the provision referred to is repugnant to the clause of the 14th Amendment forbidding a denial of the equal protection of the laws."

The principles governing the situation in this appeal by Pearson are more recently and succinctly endorsed in a case styled *Balthazar v. Mari Ltd.,* 301 F. Supp. 103 (N.D. Ill. 1969), *aff'd* 396 U.S. 114 (1969), wherein the Court below said:

> "Relying upon Supreme Court condemnation cases, plaintiffs also maintain that they were deprived of 'just compensation' for their property. See, *e.g.,* United States v. Miller, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336 (1943); City of Cincinnati v. Vester, 281 U.S. 439, 50 S.Ct. 360, 74 L.Ed. 950 (1930); Dohany v. Rogers, 281 U.S. 362, 50 S.Ct. 299, 74 L.Ed. 904 (1930); Brown v. United States, 263 U.S. 78, 44 S.Ct. 92, 68 L.Ed. 171 (1923); Chicago Burlington and Quincy R. Co. v. City of Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897). These cases are inapplicable. Rather than taking private property for a public purpose, Illinois is here collecting taxes which are admittedly overdue."

Once again, the Court cited with approval the definitive and determinative decision of *King v. Mullins, supra.*

To some considerable extent, the decision in *King* was founded upon the earlier decision of this Court in *Bell's Gap Railroad v. Pennsylvania,* 134 U.S. 232, 239 (1890), wherein this Court declared:

> " 'The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the

power of eminent domain. It involves no violation of due process of law, when it is executed according to customary forms and established usages * * * .'"

In the *Balthazar* holding, affirmed by this Court, the Court below cited with approval as late as 1969 the holding of this Court in the *Bell's Gap Railroad* case, *supra.*

In *King v. West Virginia,* 216 U.S. 92 (1910), which was a companion case to *King v. Mullins, supra,* once again the former owner raised the spectre of an alleged denial of due process under the Fourteenth Amendment. Because of the previous holding by this court in *King v. Mullins,* in *King v. West Virginia* this Court said then (and the expression is apt to this appeal): "The question is not open and we shall discuss it no more." Columbia submits that as long ago as 1898 it was determined that the system for perfecting tax deeds in West Virginia does not violate the due process provisions of the Fourteenth Amendment.

In *Kentucky Union Co. v. Kentucky,* 219 U.S. 140 (1911), as against a claim of denial of due process under the Fourteenth Admendment to the Constitution, this Court upheld the Kentucky Act of 1906 Relating to Revenue and Taxation. As recited in the opinion, the Kentucky Act permitted a proceeding by publication "in the name of the Commonwealth of Kentucky, as plaintiff, against the said tract of land and the owners or claimants of said land, as defendants, naming them if their names are known to him, and if their names are unknown to him, designating them as unknown owners and claimants thereof". Columbia submits that Pearson was proceeded against here by publication as an unknown defendant because she was an unknown defendant, and that she was not denied due process within the holding of the *Kentucky Union* case.

In *Leigh v. Green,* 193 U.S. 79, 90 (1903), the Nebraska statute involved clearly authorized a foreclosure to satisfy a tax lien without actual service against all lienholders within the jurisdiction of the Court. In upholding the statutory provisions for process by publication, the Court observed:

"Nor is the remedy given in derogation of individual rights, as long recognized in proceeding *in rem,* when the 14th Amendment was adopted. The statute undertakes to proceed *in rem,* by making the land, as such, answer for the public dues. Of course, merely giving a name to an action as concerning the thing rather than personal rights in it cannot justify the procedure if in fact the property owner is deprived of his estate without due process of law. But it is to be remembered that the primary object of the statute is to reach the land which has been assessed. Of such proceedings, it is said in Cooley on Taxation, 2d ed. 527: 'Proceedings of this nature are not usually proceedings against parties, nor, in the case of lands or interests in lands belonging to persons unknown, can they be. They are proceedings which have regard to the land itself rather than to the owners of the land; and if the owners are named in the proceedings, and personal notice is provided for, it is rather from tenderness to their interests, and in order to make sure that the opportunity for a hearing shall not be lost to them, than from any necessity that the case shall assume that form.'"

In *Ballard v. Hunter,* 204 U.S. 241, 262 (1907), in upholding an Arkansas statute, which permitted other than personal service, against the onslaught of alleged violation of due process of the Fourteenth Amendment, this Court said:

"It should be kept in mind that the laws of a state come under the prohibition of the 14th Amendment only when they infringe fundamental rights. A law must be framed and judged of in consideration of the practical affairs of man. The law cannot give personal notice of its provisions or proceedings to everyone. It charges everyone with knowledge of its provisions; of its proceedings it must, at times, adopt some form of indirect notice, and indirect notice is usually efficient notice when the proceedings affect real estate. Of what concerns or may concern their real estate men usually keep informed, and on that probability the law may frame its proceed-

ings; indeed, must frame them, and assume the care of property to be universal; if it would give efficiency to many of its exercises. This was pointed out in Huling v. Kaw Valley R. & Improv. Co. 130 U.S. 559, 32 L.ed. 1045, 9 Sup. Ct. Rep. 603, where it was declared to be the 'duty of the owner of real estate, who is a non-resident, to take measures that in some way he shall be represented when his property is called into requisition; and, if he fails to get notice by the ordinary publications which have been usually required in such cases, it is his misfortune, and he must abide the consequences.' It makes no difference, therefore, that plaintiffs in error did not have personal notice of the suit to collect the taxes on their lands or that taxes had been levied, or knowledge of the law under which the taxes had been levied."

As observed in the decision in this case by the Supreme Court of Appeals of West Virginia, under Code §11A-3-8 if redemption by the owner does not occur within eighteen months of the date that the tax delinquent property is sold to the State of West Virginia, then absolute title vests in the State of West Virginia. The interest of Pearson was sold to the State in 1962. The publication of which Pearson complains occurred in 1966 at a time when the State, in effect, was auctioning off land which it owned because of the previous delinquent tax procedure.

Decisions of the Supreme Court of Appeals of West Virginia have consistently held that the former owner has no right to be a party to the proceedings for the sale of land previously sold to the State of West Virginia for delinquent taxes. *State v. Simmons,* 135 W.Va. 196, 64 S.E. 2d 503 (1951); *State v. Gray,* 132 W. Va. 472, 52 S.E. 2d 759 (1949); *State v. Blevins,* 131 W.Va. 350, 48 S.E. 2d 174 (1948); *McClure v. Maitland,* 24 W. Va. 561 (1884).

Pearson cites the authority of *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950), to the following effect:

> "Where the names and post office addresses of those affected by a proceeding are at hand, the reason disappears for resort to means less likey than the mails to apprise them of its pendency." (At page 318 of 339 U.S.)

In the factual situation in this case involving Pearson, the notice complained of occurred in 1966. The record is devoid of any indication that the Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia, knew or should have known the name or address of Pearson. Indeed, in her statement of the case, Pearson concedes that in spite of the deed to her from H.C. Pearson, Jr. in 1937, the Appellant did not have corrected the entry in the Land Books from the former owner's name to her own.

The plain import of Pearson's position is that a valid tax sale in 1966 required the State to pursue a record title search for a period of thirty years going back to 1937, to find Pearson's name and claimed interest, and then to pursue some further inquiry as to her address, despite the imposssibility or impracticability of such an endeavor by reason of the passage of almost thirty years.

While the State is not concerned with who specifically pays the taxes, if the taxes are not paid, the State's requirements for revenue dictate the need of a tax-sale to place the asset in the hands of an owner who will pay the taxes. In this regard, the declarations of legislative purposes and policy are clear. See Code §11A-3-1 and Code §11A-4-1.

In West Virginia, there is no requirement of or procedure for determining the address of the taxpayer. The rationale underlying the lack of any such procedure is particularly evident with reference to severed mineral interests, such as here involved. Hidden assets of this nature cannot be likened to improvements on the surface, such as residences, where the whereabouts of parties in interest may be apparent or easy of determination, and where seizure for

delinquent taxes would be notice of the lien, delinquency and impending disposal to satisfy the taxes.

In Pearson's case, while the interest was owned by Pearson, it remained assessed in the name of her son (who had conveyed it to Pearson) for almost a quarter of a century. For years, the tax tickets were in fact secured and paid by Pearson or her husband (App. 40-42). Pearson's husband was an experienced businessman (App. 39) who, at one time, owned interests in fifty to seventy tracts of land (App. 40). Not only had Pearson or her husband paid the tax ticket for many years, the effect—loss of title—of not paying the tax ticket was clearly known to them (App. 41-42).

In distinguishing the principles of *Mullane* from the facts in *Pearson* (the present case), it is apparent that an attempt to comply with *Mullane* in a prospective tax-deed situation would involve not just the relatively minor costs of, say, mailing the notices to the interested parties. Applying *Mullane* to a prospective tax-deed situation would involve the impracticable, frequently impossible and unquestionably considerable expense of first determining the identity of the interested parties. In this case, the interest of Pearson would have been revealed in 1966 only by an examination of records covering a period back to 1937—a 30 year title search. In West Virginia, to determine the ownership of gas, oil and mineral interests, such as here involved, a title examiner could not stop short of the year 1850, the beginning of the era of severances generally of surface and mineral titles. *See Freudenberger Oil Co. v. Simmons,* 75 W. Va. 337, 83 S.E. 995 (1914) and *United Fuel Gas Co. v. Dyer,* 185 F.2d 99 (1950). An application of the principles of *Mullane* in prospective tax-deed situations would require searching the records back 125 years! Ultimately, such search would, if fruitful, disclose merely the names of parties in interest. One is left to imagine the impossible effort and prohibitive expense required in attempting to determine the addresses of the interested parties whose names were disclosed by such title search.

Pearson's contention for direct notice within *Mullane* is best answered by the authority of *City of New Rochelle v. Echo Bay Waterfront Corp.,* 49 N.Y.S.2d 673, 268 App. Div. 182, *aff'd* 60 N.E.2d 838, 294 N.Y. 678, *cert. denied,* 326 U.S. 720 (1945), to the following effect:

> "It is settled law, however, that indirect notice is sufficient to persons interested in real property which is in default in payment of taxes. 'The land stands accountable to the demands of the state, and the owners are charged with the laws affecting it and the manner by which those demands may be enforced. Huling v. Kaw Valley Ry. & Imp. Co., 130 U.S. 559, 9 S.Ct. 603 32 L.Ed. 1045. This accountability of the land and the knowledge the owners must be presumed to have had of the laws affecting it is an answer to the contention of the insufficiency of the service.' Ballard v. Hunter, 204 U.S. 241, 254, 255, 27 S.Ct. 261, 266, 51 L.Ed. 461."

Pearson cites the authority of *Walker v. City of Hutchinson,* 352 U.S. 112 (1956), in which this Court held that newspaper publication of condemnation proceedings against a landowner, whose name was known to the city and on official records, was insufficient notice to meet the requirements of due process. Here there is not the slightest indication that the Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia, knew or should have known the name or address of Pearson at the time of such publication.

With reference to *Walker, supra,* which was a condemnation case, beyond peradventure the landowner who complained of inadequate notice was truly the owner. In the facts involved in this appeal by Pearson, in view of the provisions of Code §11A-3-8, after the passage of eighteen months from the sale of Appellant's land in 1962 to the State of West Virginia, the owner in 1966 was not Pearson but rather the State of West Virginia.

The case of *Schroeder v. City of New York,* 371 U.S.

208 (1962), cited by Pearson, must be distinguished from the present appeal. Once again, the *Schroeder* case was a condemnation action wherein the Appellant was admittedly the true owner. Moreover, the record in that case reflected that both the name and address of the Appellant were readily ascertainable. Furthermore, analysis of this decision indicates that the condemning authority did not comply with the requirements for posting, as specified in the enabling legislation, which omission alone violated the requirements of statute. In the present case, the tax delinquency proceedings were in exact compliance with the statutes.

The case of *Covey v. Town of Somers,* 351 U.S. 141 (1956), also relied on by Pearson, involved the foreclosure of tax liens on real property where the conceded owner of the property (proceeded against by mailing, posting and publication) was an incompetent without the benefit and protection of a guardian. In contrast, in this case Pearson concedes that she knowingly did not fulfill her responsibility in changing the entry on the Land Books from the name of the former owner to her own. Moreover, after paying the taxes for the years 1938 through 1960, Pearson concedes that she omitted to pay taxes assessed for 1961. Under such facts, Pearson can hardly equate her position with that of the incompetent in the *Covey* case.

The case of *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1966), involved a garnishment procedure in Wisconsin, held violative of due process because the defendant was deprived of the "use" of the garnished portion of her wages during the interim between the garnishment and culmination of the main suit. However, even *Sniadach* conceded distinguishable situations where such summary procedure may well meet the requirements of due process in extraordinary situations. Special protection to a State interest was observed as a distinguishable fact not present in *Sniadach* (395 U.S. 337, 339). A viable State interest is certainly extant in this present case.

As pointed out in the dissent in *Sniadach,* if a procedure has prevailed for many years by common consent, it should require a strong case for the Fourteenth Amendment to affect it (395 U.S. 337, 349). The procedure for collection of real property taxes in West Virginia finds its aegis in its Constitution of 1872 and upheld by this Court in *King v. Mullins,* 171 U.S. 404 (1898). Literally thousands of land titles are founded upon the procedures long followed in West Virginia.

Fuentes v. Shevin, 407 U.S. 67 (1972), held violative of due process Florida and Pennsylvania replevin statutes insofar as they denied the right to a prior opportunity to be heard before chattels were taken from their possessor. Once again, *Fuentes* conceded and distinguished situations allowing seizure of property necessary to secure an important government function or general public interest (407 U.S. 67, 90-91). Columbia submits that the collection of taxes is such an important governmental function and general public interest.

Robinson v. Hanrahan, 409 U.S. 38 (1972), held that notice of forfeiture of an automobile violated due process since the notice mailed by the State to the owner at his home address was not "reasonably calculated" to apprise the owner of the proceedings, when the State was holding the owner in jail. Such objectionable procedure can hardly be equated with the facts in *Pearson.*

This Court is not faced with a claim of a denial of equal protection within the intent of the Fourteenth Amendment. However, even in a case involving such a contention, this Court has recently deferred to a state tax law reasonably designed to further a state policy. *Kahn v. Shevin,* 416 U.S. 351, 355 (1974). In that case, this Court again cited with approval *Bell's Gap Railroad v. Pennsylvania, supra.* The Court will recall that *Bell's Gap* was the case which preceded and, to some considerable extent, formed the bases on which *King v. Mullins, supra,* was founded. To reiterate, it was *King,* almost eighty years ago, which held

that the system of taxation in the State of West Virginia, and its provisions for forfeitures, were not repugnant to the protection of the Fourteenth Amendment.

Implicit in Pearson's complaint (and sometimes suggested by the commentators on *Mullane*) is the possibility of a windfall in the tax-deed purchaser. In proper perspective, there is no "windfall" involved in this case. For the year 1961, Pearson valued the asset so highly that she discontinued paying taxes in the amount of 77¢ per half. In 1966, Pearson valued the asset so highly that she did not pay $42.58 (App. 92) to redeem it during the pendency of the suit by the Deputy Commissioner of Forfeited and Delinquent Lands.

In short, but for the improvements by Columbia in drilling the well for the sum of $104,500.87 and the value of the gas produced since March 26, 1968, the asset would not now be worth the time and effort of Pearson.

In 1968, only after the investment of $104,500.87 by Columbia in improving the property, did Pearson attempt a redemption from the State Auditor for the sum of $101.86 (App. 121). It is apparent that any asserted "windfall" will not be at the expense of Pearson but—rather—at the expense of Columbia.

The Supreme Court of Appeals of West Virginia in its decision against Pearson went to the heart of the matter when it held:

> "We have determined that the forceful arguments advanced to restore the property interest of a former owner must, necessarily, fall before compelling State interests, —often recognized in prior decisions and tenaciously maintained in statements of legislative policy—, to resolve uncertainties in land titles and to protect the State's revenues derived from land usage taxation. In this endeavor, we have intended to balance delicately the interests of the individual with those of all the State's citizenry, within the constitutional parameters of due process." (App. at 23A Jurisdictional Statement).

Under the authority of *King v. Mullins, supra,* decided by this Court almost eighty years ago and never overruled, innumerable land titles in the State of West Virginia are founded upon the proposition that statutory tax delinquency procedures in West Virginia do not deny due process of the Fourteenth Amendment to the Constitution. Columbia respectfully submits that this Court should affirm that principle; indeed any other holding would wreak havoc in the State of West Virginia.

Since the authorities support Columbia's position that the notice by publication involved in West Virginia's tax delinquency statutes does not deny due process of law, this appeal does not require consideration of whether a statute of limitation (which Pearson characterizes Code §11A-3-8) might bar Pearson from contesting the validity of the tax sale. Nevertheless, Columbia will respond, *arguendo,* to Pearson's last Point.

II. WEST VIRGINIA CODE §11A-3-8 VESTING TITLE IN THE STATE TO TAX DELINQUENT PROPERTY, NOT TIMELY REDEEMED, RENDERS MOOT ANY QUESTION OF THE ADEQUACY OF NOTICE BY PUBLICATION ONLY TO THE PRIOR OWNER AT THE SUBSEQUENT SALE OF THE STATE'S TITLE.

In a maze of facts and allegations, some pertinent facts have been obscured. In West Virginia, real property taxes are a lien on the property for all taxes, interest and charges as of each July 1st of the year for which they are assessed. Code §11A-1-2. The taxes involved in the present Pearson case were for the year 1961. Taxes are payable in two installments, the first half on September 1st (delinquent October 1st) and the second half payable the following March 1st (delinquent April 1st). Code §11A-1-3. No taxes were paid on Pearson's interest for 1961 taxes or subsequently. Delinquent lists are posted at the Courthouse and published pursuant to Code §11A-2-13. This is not the publication of which Pearson complains. Of course, at this stage, the affected owner has a right to redeem.

Pursuant to Code §11A-2-14, on or before June 15th of the next year, the Sheriff presents the delinquent lists to the County Court for examination. If that Court is satisfied that the lists are correct, the Clerk of the Court certifies a copy of the list to the State Auditor not later than July 1st.

On or before September 10th, the Sheriff prepares a second list of delinquent lands, together with a Notice of Sale, and publishes the same pursuant to Code §11A-3-2. Once again, the owner has an opportunity to redeem. Beyond question the interest of Pearson was delinquent and proceeded against as provided by statute (App. 52-53, 72).

However, if the land or interest therein is not redeemed, between October 15th and November 23rd, the Sheriff sells the item at public auction pursuant to Code §11A-3-4. At the Sheriff's sale, the delinquent item can be bid in by any interested party, which successful bid (after sundry steps and passage of time) culminates in a tax-deed from the County Clerk to the successful bidder. Code §11A-3-15, 20, 21, 23, 24 and 25. It is not a County Clerk's tax deed which is involved in the *Pearson* case.

At the Sheriff's sale, if no person present bids the amount of taxes, interest and charges due, the delinquent land is purchased by the Sheriff on behalf of the State of West Virginia for the amounts so due. Code §11A-3-6. This is what occurred in 1962 as to Pearson's mineral interest; the State did not undertake to divest its interest until 1966. The State's title was pursuant to Code §11A-3-7 by which title vested in the State in 1962, subject to a right of redemption in the former owner from the State Auditor in the 18 months next ensuing.

Moreover, Code §11A-3-8 contains the language and details the effect of which Pearson complains:

> "The former owner of any real estate so purchased by the State, or any other person who was entitled to pay the taxes thereon, may redeem such real estate from the auditor at any time within eighteen months after the date of such purchase. Thereafter such real estate shall be irredeemable and subject to transfer or sale under the provisions of sections 3 and 4, article XIII of the Constitution."

Pearson made no effort in the 18 month period to redeem her interest.

In Pearson's Brief on the Merits (p. 9), Appellant cites *Paschall v. Christie-Stewart, Inc.*, 414 U.S. 100 (1973), observing that this appeal presents the Court with the precise issue found not to be present in *Paschall.*

Columbia concurs in Pearson's observation of the pertinency of *Paschall.* However, *Paschall,* and the authority therein cited, have a more telling effect in this appeal than merely defining an undecided issue which should be decided. A comparison of *Paschall* with the present appeal by *Pearson* is both necessary and determinative. The rule of *Paschall* requires the dismissal of this appeal.

In *Paschall,* the former owner of real estate brought a suit to quiet title as against the purchaser at a tax sale. The trial of the case involved issues of due process and a statute of limitations, and the trial court upheld the Oklahoma statutes on both issues. On the issue of due process, the Oklahoma Court of Appeals reversed the trial court. However, the Supreme Court of Oklahoma overruled the Court of Appeals on the issue of due process. Upon appeal to the United States Supreme Court, this Court, observing that it had probable jurisdiction on the authority of *Mullane v. Central Hanover Bank & Trust Co., supra,* remanded *Paschall* to the Supreme Court of Oklahoma to determine whether, under state law, the statute of limitations independently barred the former owner's attack on the tax title. If that should prove to be the case, this Court observed, any decision by this Court would be advisory and beyond its jurisdiction, citing *Murdock v. City of Memphis,* 20 Wall. 590 (1875). On remand, the Oklahoma Supreme Court held that there existed an adequate state ground (a statute of limitations) to support its earlier

decision. *Christie-Stewart, Inc. v. Paschall,* 45 J. Okla B. Ass'n. 2523 (1974).

What, then is the decisive meaning of *Paschall* on the present appeal? In *Pearson,* now before the Court, the former real estate owner (Pearson) brought a suit to quiet title as against the purchaser (Dodd) at a tax sale. The trial court upheld the West Virginia statutes in all respects, including the issue of due process. Upon appeal from the trial court, the Supreme Court of Appeals of West Virginia upheld the lower court on the issue of due process and, further, held that the attack by Pearson on the tax sale was barred by the absence of a statutory entitlement pursuant to the provisions of Code §11A-3-8. This is conceded by Pearson in her Brief on the Merits (p. 14-15).

Following the rationale of the *Paschall* case, Columbia submits that there is no need for remand to the Supreme Court of Appeals of West Virginia: under the law of the State of West Virginia, it has already been determined that the absence of a statutory entitlement under Code §11A-3-8 independently bars Pearson's claim. *McClure v. Maitland,* 24 W. Va. 561 (1884). As this Court observed in *Paschall,* any decision by this Court would be advisory only and beyond its jurisdiction. *Murdock v. City of Memphis, supra.*

For more than 100 years, the applicable rule of law has been, and remains, as stated in *Murdock:*

> "5. If it [this Court] finds that it [the constitutional question] was rightly decided, the judgment must be affirmed."
>
> "6. If it [the constitutional issue] was erroneously decided against plaintiff in error, then this court must further inquire, whether there is any other matter or issue adjudged by the State Court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the federal question. If this is found to be the case, the judgment must be affirmed without inquiring into

> the soundness of the decision on such other matter or issue." (22 L.Ed. 429, 444).

Based on previous decisions of local law in West Virginia, the Supreme Court of Appeals of West Virginia held in its decision in the present *Pearson* case:

> "It is our belief, and we so hold, that [under *Code,* 11A-3-8, *supra*] a former owner possesses a statutory entitlement, i.e. a right to redeem at any time within eighteen months of the date of the State purchase. If, however, redemption does not occur during this period, then the statutory entitlement no longer exists because absolute title has vested in the State. Only at this latter point in time is the State permitted by *W. Va. Const.,* Art. XIII, §§ 3 and 4 to institute a suit to sell lands for the school fund. *State v. Gray,* 132 W. Va. 472, 52 S.E.2d 759 (1949); *State v. Blevins,* 131 W. Va. 350, 48 S.E.2d 174 (1948); *State v. Farmers Coal Co.,* 130 W. Va. 1, 43 S.E.2d 625 (1947)". (App. at 20A Jurisdictional Statement).

In Pearson's Brief on the Merits, the position is taken (p. 12-13) that Columbia did not raise the issue of the absence of a statutory entitlement in *Pearson* under West Virginia Code §11A-3-8. Such assertion is not consistent with the Record in this case. The thrust of §11A-3-8 is that after any sale to the State for delinquent taxes, the former owner may redeem within 18 months; thereafter, such real estate is irredeemable and subject to transfer or sale by the State under the provisions of Sections 3 and 4, Article XIII of the Constitution of the State.

As early as December 2, 1968 in its initial pleading, Columbia, in addition to denying Pearson's title, in its Second Defense at paragraph 4 thereof, affirmatively took a position as follows:

> "4. Defendant admits that the Deputy Commissioner sold the subject land; admits that such sale included all interest of H. C. Pearson, Jr., and the interest claimed by plaintiff and that such sale included all

the title to the subject land and interests therein acquired by the State of West Virginia through the sale to it in the year 1962 for nonpayment of property taxes thereon for the year 1961. This defendant avers that such sale, and the deed executed pursuant thereto, included all right, title and interest of the State of West Virginia, however acquired, in the subject land." (App. 13).

Such specific defense is, in effect, the thrust of Code §11A-3-8 merely restated.

In support of Pearson's argument that West Virginia Code §11A-3-8 violates due process, this Court is referred by Pearson to decisions by the high Court in sister states, such as Michigan, Minnesota, Mississippi and Kansas (Brief on the Merits, p. 10-12).

To attempt to compare the situations involved in those states with the situation involved in West Virginia with Pearson is to compare "apples" with "oranges". If state law is probative or determinative on the issue, the Supreme Court of Appeals of West Virginia has determined that the procedure for tax deeds in West Virginia, formulated by its Constitution and Legislature, independently vests all title in the State, renders the same irredeemable and does not violate due process (App. A Jurisdictional Statement).

In *Pearson,* we have a situation where, for the year 1961, taxes were assessed, unpaid and delinquent. In 1962, Pearson's title was sold to the State of West Virginia where the title remained until 1966 when that title was sold by the State of West Virginia to Dodd. At that time, Pearson had no significant property interest for she had no title or interest after the year 1962 when her former interest became irredeemable. With a lease from Dodd, Columbia entered on the property and on March 26, 1968, at an initial cost of $104,500.87, completed a natural gas well with an initial open flow of 100,000,000 cubic feet of gas (App. 117-120). Only thereafter, on July 26, 1968, did Pearson pay the State Auditor $101.86 and receive what

was designated a Certificate of Redemption of Land in Pearson's name for the property in question (App. 121). It was even later in 1968 before Pearson commenced in the trial Court the litigation now the subject of this appeal. By then, Pearson's title had been sold to the State of West Virginia and by it, in turn, to Dodd.

Irrespective of whether the issue of due process was correctly decided (Columbia's position is that it was correctly decided), Columbia submits that the judgment of the Supreme Court of Appeals of West Virginia is sufficiently broad in its ruling that Code §11A-3-8 independently bars Pearson's claim and that the judgment should be affirmed without further inquiry into the due process issue.

III. INDEPENDENT OF THE OTHER QUESTIONS, DUE PROCESS OBJECTIONS DO NOT JUSTIFY THE RETROACTIVE INVALIDATION OF INNUMERABLE LONG ESTABLISHED LAND TITLES.

Certain legal principles applicable in *Pearson* are not unlike those prior situations before this Court where municipal bond issues were attacked on constitutional grounds as violative of the Fourteenth Amendment. *Phoenix v. Kolodziejski,* 399 U.S. 204 (1970), is such a case wherein a restriction in Arizona, limiting the vote in elections to approve the issue of general obligation bonds, without question violated the Fourteenth Amendment.

Nevertheless, this Court was careful to adopt a rule which avoided any unjustifiably disruptive effect of retroactivity. Touching on the question of any statute of limitations, this Court said:

> "In the case of States authorizing challenges to bond elections within a definite period, all elections held prior to the date of this decision will not be affected by this decision unless a challenge on the grounds sustained by this decision has been or is brought within the period specified by state law." (399 U.S. 204, 214).

In *Cipriano v. Houma,* 395 U.S. 701 (1969), this Court recognized the significant hardships possibly imposed if decisions finding unconstitutionality based on the Fourteenth Amendment were given full retroactive effect. In confining any decision to prospective application, this Court said:

> "That is, we will apply it only where, under state law, the time for challenging the election result has not expired, or in cases brought within the time specified by state law for challenging the election and which are not yet final. Thus, the decision will not apply where the authorization to issue the securities is legally complete on the date of this decision. Of course, our decision will not affect the validity of securities which have been sold or issued prior to this decision and pursuant to such final authorization." (395 U.S. 701, 706).

In *Pearson,* the authorization by Court orders to issue the tax-deed to Dodd has been legally complete since June 1, 1966 when the deed was made and delivered, pursuant to existing procedures under state law. On the basis of those existing state procedures and the tax-deed dated June 1, 1966, Columbia secured an oil and gas lease from Dodd and drilled a valuable gas well on the tax-deed title at an initial investment of $104,500.87. On March 26, 1968, Columbia completed such well as a natural gas well with an initial open flow of 100,000,000 cubic feet of gas. Surely a tax-deed acted on in good faith by a sizeable investment on the basis of existing law of presumed constitutionality can be equated with a municipal bond and honored as an existing security and asset, within the intent of *Cipriano* as endorsed by *Phoenix.*

The Record is replete with indications of the ramifications of this litigation in the State of West Virginia. In the Order of Publication (App. 77-80) wherein the interest of Pearson was proceeded against, 24 additional tracts, lots or interests were proceeded against by publication.

In West Virginia, there are fifty-five Counties. Each County has a Deputy Commissioner of Forfeited and Delinquent Lands. Each Deputy Commissioner is authorized to bring an action, in the name of the State of West Virginia, to sell forfeited or delinquent lands in that County, including 25 tracts, lots or interests in each such suit. The exact procedure under attack has been extant in the State of West Virginia since 1947. A mathematical extrapolation of those factors will produce a resultant figure of affected titles in the State of West Virginia almost too horrendous to contemplate. Considering the State's need for revenue, the necessity and desirability of the stability of land titles toward keeping those titles in the commerce of the State, any determination of violation of the Fourteenth Amendment calls for a decision only prospective in application.

CONCLUSION

Counsel for Columbia respectfully submit that the decision of the Supreme Court of Appeals of West Virginia is clearly correct; that this appeal does not present a substantial federal question; that the judgment below rests on an adequate non-federal basis; and, that this Court should dismiss this appeal and affirm the decision below.

Respectfully submitted,

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September 3, 1976

AFFIDAVIT OF SERVICE OF APPELLEE'S BRIEF ON THE MERITS

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, TO-WIT:

I, WM. ROY RICE, attorney for Columbia Gas Transmission Corporation, Appellee herein, depose and say that on the 3rd day of September, 1976, I served three copies of the foregoing Appellee's Brief on the Merits to the Supreme Court of the United States upon Cecle G. Pearson, Appellant herein, by depositing the same in a United States post office or mail box, with first class postage prepaid, addressed to Philip G. Terrie, counsel of record for said Cecle G. Pearson, at 1009 Security Building, Charleston, West Virginia 25301; and, further that I served three copies of the foregoing Appellee's Brief on the Merits to the Supreme Court of the United States upon W. P. Dodd and Ernestine Dodd, his wife, Appellees herein, by depositing the same in a United States post office or mail box, with first class postage prepaid, addressed to William E. Hamb, counsel of record for said W. P. Dodd and Ernestine Dodd, at his office at 950 Kanawha Boulevard, East, Charleston, West Virginia 25301.

/s/ Wm. Roy Rice

Subscribed and sworn to before me by Wm. Roy Rice, at Charleston, West Virginia, this 3rd day of September, 1976.

My commission expires April 4, 1985.

/s/ Mary Marie Clendenin
Notary Public in and for
The State of West Virginia

FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1318

CECLE G. PEARSON,

Appellant

versus

W.P. DODD; ERNESTINE DODD,
his wife; and COLUMBIA GAS TRANSMISSION
CORPORATION,

Appellees.

ON APPEAL FROM A DECISION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

REPLY BRIEF ON THE MERITS

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November 23, 1976

Dunbar Printing Co., Dunbar, W. Va.

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REPLY BRIEF ON THE MERITS

SUMMARY OF REPLY ARGUMENT

This summary is incorporated into this brief for the purpose of explaining the logical arrangement of the appellant's reply. The appellant will first of all address the two basic points most recently discussed in the appellant's Brief On The Merits. These two are the main Notice-Hearing-Due

Process issue and secondly the due process effect of permitting a statute of limitations (however created) to be utilized to pre-empt the constitutional right to notice and hearing before something is done to one's person or property rights. The third segment of this reply brief is inserted strictly for the purpose of clarification.

- I -

The West Virginia Supreme Court of Appeals through Chief Justice Haden, in the fourth part of its opinion was proceeding in the direction of an acceptance of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 336 (1950), and had the Court not deviated from this direction the main due process issue by the Court would probably have resulted in ultimate relief for the appellant. The Court did not, however, establish this approval, but became involved with a problem created by the Court itself with the term "Interested Parties" (pp. 16A, *et seq.*, Jurisdictional Statement). It should also be made clear that the case of *State v. Simmons*, 135 W. Va. 196, 64 S. E. 2d 503 (1951), was a three to one decision in the year 1951 (one judge not participating), which by no means left the law in the State of West Virginia settled for the period of time from 1951 to the present. The fact that *State v. Simmons, supra,* was a three to one decision further reinforces the assertion that the law was not settled, as the appellee, Columbia Gas Transmission Corporation, would have the Court believe by its repeated references to *King v. Mullins*, 171 U. S. 404 (1898).

Further, the case of *King v. Mullins, supra,* interpreted the forfeiture for non-entry law of the State of West Virginia, not the delinquency for non-payment of taxes law. All that case really holds is that forfeiture for non-entry can take place by operation of law and does not have to be judicially determined. This does not violate due process because when a suit is brought to sell the land thus forfeited, all claimants are to be made parties and to be brought in by personal service of summons upon all found in the county. The Court says, at page 429:

". . . . it would seem to follow necessarily that if the statutes of the State, in connection with the constitution, gave the taxpayer reasonable opportunity to protect his lands against a forfeiture arising from his failure to place them upon the land books, there is no ground for him to complain that his property has been taken without due process of law."

As an historical fact, this case now before this Court is the first time the main due process issued involved with delinquent tax sales in the State of West Virginia has been fully and thoroughly litigated to this level, notwithstanding the contrary claims of appellee, Columbia.

As an historical oddity it is significant that nowhere in his admittedly learned dissertation, does the Chief Judge of the West Virginia Supreme Court of Appeals note the extremely well reasoned article on this subject by The Honorable George G. Bailey, entitled, "Process in Forfeited and Delinquent Lands Suits - A Moot Question," 54 W. Va. L. Rev. 47 (1951).

The undersigned would highly recommend to the Court that it review this law review article as well as a review of the excellent dissent in *State v. Simmons, supra,* by Judge Fox, for further information on this topic.

Appellant would also call attention to the recent case of *Dow v. State of Michigan,* 396 Mich. 192, 240 N. W. 2d 450 (1976), decided April 1, 1976. This case, involving the Delinquent Tax Law of the State of Michigan, considers in detail every question raised by the instant case and decides all in favor of the property owner who does not receive adequate notice. It is submitted that this case and the article from The Yale Law Journal mentioned in Appellant's Brief On The Merits are sufficiently persuasive. Indeed, as stated in the *Dow* case "the burden (due process) required by the Constitution is manageable."

- II -

What we are dealing with in the second phase of this action (Due Process - The Statute of Limitations or Statutory Entitlement Question), is really confiscation of property by administrative action and not judicial action. Unfortunately, however, it is a situation where the administrative action is being allowed to masquerade as a judicial action. The brief of Amicus Curiae filed on behalf of the State of West Virginia serves to point this out with citation of the West Virginia case of *Sims v. Fisher,* 125 W. Va. 512, 25 S. E. 2d 216 (1943). (See page 16 Amicus Curiae Brief). By its reference to *Sims v. Fisher, supra,* the Attorney General's brief points out that that case held that a legislative mandate requiring Circuit Courts to perform administrative and nonjudicial functions is unconstitutional. The brief goes on to say that in order to comply with *Sims v. Fisher* the Legislature, therefore, decreed that a suit be brought, as was done in the instant case. Unfortunately, however, the result was a suit that is not a suit and, therefore, by following the Attorney General's argument we are led to the conclusion that the present law is unconstitutional for the reason that it is not a judicial proceeding even though it is said to be judicial in nature.

By toiling with form over substance, the appellee and the Attorney General have ignored the basic fact that a lawsuit needs a defendant who has some rights at the time the lawsuit is instituted and, hopefully, a defendant who retains certain of these rights during the pendency of the proceeding. Otherwise there is no point in having a defendant, regardless of what technical justification is employed in calling the defendant a defendant when in reality he or she is not. A reaffirmation is needed of some of the "hard logic" called for by Judge Fox in *Sims v. Fisher, supra,* as well as the comments of Justice Seldon referred to in the Jurisdictional Statement at page 10 of that document, which states:

"It follows that a law which, by its own inherent force, extinguishes rights of property or compels their extinction without any legal proceedings whatever, comes directly in conflict with the constitution."

This Court is being asked by appellee, Columbia, and the Amicus Curiae, one of the State of West Virginia's constitutional officers, to condone, if not affirm, a statute which flies in the face of the due process of law and the natural law on which the common law is based. If in fact a statute of limitations is to be allowed to curtail the rights of the appellant in this setting it should only be allowed to do so after a reasonable time has run after the institution and final adjudication of the action, not before. Here the appellee, Columbia, and the Attorney General of the State of West Virginia are attempting to deprive a citizen of her rights in violation of the Fourteenth Amendment, as well as the natural law, by a legislative fiat which pre-empts these rights before they even accrue. Accrue they must for the action complained of (the Deputy Commissioner's) to be a legitimate action.

- III -

The appellee, Columbia, has endeavored to accomplish a victory of form over substance. By stating "the record is devoid of any indication that the Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia, knew or should have known the name or address of Pearson," it is inherently clear that the appellee, Columbia, chooses to ignore the frequently referred to stipulation "D" (A.52), which stipulation can only lead to the inference that this knowledge was available. The appellant is not suggesting that the Deputy Commissioner should be required by some mandate to conduct such a title examination as suggested, at p. 12 of appellee's, Columbia's, Brief On The Merits. However, this matter of notice could be managed by two simple courses of action. One, in cases where personal service can be obtained, the

record will clearly show personal service, thus eliminating any problems associated with process. Two, in cases where personal service cannot be obtained it will be a relatively simple matter, considering the property rights involved, for a short evidentiary hearing to be held concerning the efforts to ascertain the whereabouts and the efforts to personally serve such named defendants on whom service cannot be personally obtained. In the case of those who are published against as unknowns, a short evidentiary statement could be obtained which would explain the reason for proceeding against such persons as unknowns. As a part of the record on file this statement would then be available for determining the validity of the derivative title obtained at the tax sale. In this day of concern for the constitutional protection of the rights of accused in criminal matters, it is not too much to assume some minimal assertion by the courts in this civil law area to protect the rights of persons in their property, At least in criminal trials the accused must be present in court before his alleged wrongdoings may be adjudicated.

With regard to the requirements of pleading a statute of limitations the jurisdictional statement, the supplemental brief thereon, and the Brief On The Merits by the appellant have clearly pointed out the many problems the appellee has with this particular situation. The explanation offered by the appellee, Columbia, is not adequate. The fact is the Supreme Court of the State of West Virginia rescued appellee, Columbia, from what would have otherwise been an untenable position and it is doing its best to rationalize an argument it did not initiate in the first place.

The specific requirements for a statute of limitations are enunciated in 51 American Jurisprudence 2d pp. 596 and 640:

"Historically, the laws limiting actions are the creation of statute. Thus, limitation-of-action concepts have come into the law not through the judicial process but through legislation, and where there is no statute of limitations applicable to the case there can be no default rising from

mere lapse of time. One may have the protection of the policy of the statute of limitations while it exists, but the history of limitation pleas shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

"Generally speaking, the nature of the cause of action determines the applicable statute of limitations, and of course, a statute of limitations can never become operative until there is a cause of action to which it may be applied.

"A limitation statute applies generally to all causes of action within its terms, and any action brought after the time limited for its commencement prima facie is barred regardless of the hardship which it may work. However, such a statute applies only to the particular actions which it recites, and no others, and the courts cannot, under the guise of construction, apply a statute of limitations to cases not within the statutory provisions."

It is apparent from a reading of W. Va. Code, 11A-3-8 that the above requirements for a statute of limitations are not met.

CONCLUSION

It is abundantly clear that the main point involved in this case is that of whether notice and hearing protections are to be afforded property owners as they have been afforded in many other areas of the recently developing common law. The second concern is a matter of natural law and in doing that which is right. Is our judicial process to be subverted in such a manner that we are to allow form - no matter how artfully contrived - to overpower substance - to terminate the rights of an individual without due process of law?

The appellant is not seeking to have this Court define whose motives are the most pristine - those of the purchasers at a tax sale or those of a "former owner" who subsequently seeks redemption of her interest - the appellant is seeking justice not only for herself, but for those who may follow

her. Due to the many obvious layers of procedure and the many burdens placed upon the appellant from a brief perusal of this record, it is apparent, few, if any, could afford to litigate the questions involved in this proceeding unless the potential rewards were remunerative. The peculiar element which this litigation contains is the preciseness of the issues involved and their general applicability to many other litigious proceedings involving tax sales. With this case the Court has the opportunity to decide the validity of procedures to be followed in many jurisdictions for many years in the future. If modifications are in order, as is strongly urged by appellant, now is the time to see that the appropriate steps are taken.

Based on the foregoing the appellant restates her previous position that her Fourteenth Amendment Rights have been violated necessitating a reversal of the Court below by this Honorable Court.

Respectfully submitted,

s/Philip G. Terrie
1009 Security Building
Charleston, West Virginia 25301
Counsel for Appellant

AFFIDAVIT OF SERVICE OF APPELLANT'S REPLY BRIEF ON THE MERITS

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, TO-WIT:

I, PHILIP G. TERRIE, attorney for Cecle G. Pearson, Appellant herein, depose and say that on the 23rd day of November, 1976, I served three copies of the foregoing Appellant's Reply Brief On The Merits to the Supreme Court of The United States upon W. P. Dodd and Ernestine Dodd, his wife, Appellees herein, by depositing the same in a United States Post Office or mail box with first class postage prepaid, addressed to William E. Hamb, counsel of record for said W. P. Dodd and Ernestine Dodd, his wife, at his office at 950 Kanawha Boulevard, East, Charleston, West Virginia 25301, and, further, that I served three copies of the foregoing Appellant's Reply Brief On The Merits to the Supreme Court of The United States upon Columbia Gas Transmission Corporation, Appellee herein, by depositing the same in a United States Post Office or mail box with first class postage prepaid, addressed to William Roy Rice, counsel of record for said Columbia Gas Transmission Corporation, at his office at P. O. Box 1273, Charleston, West Virginia 25325, and also that I served three copies of the foregoing Appellant's Reply Brief On The Merits to the Supreme Court of The United States upon Columbia Gas Transmission Corporation, Appellee herein, by depositing the same in a United States Post Office or mail box with first class postage prepaid, addressed to Thomas E. Morgan, counsel of record for said Columbia Gas Transmission Corporation, at his office at P. O. Box 1273, Charleston, West Virginia 25325, and also that I served three copies of the Appellant's Reply Brief On The Merits to the Supreme Court of The United States upon The State of West Virginia by depositing the same in a United States Post Office or mail box with first class postage

prepaid, addressed to Jack C. McClung, counsel of record for said The State of West Virginia, at his office, Room 26-E, State Capitol, Charleston, West Virginia 25305.

/s/ Philip G. Terrie

Subscribed and sworn to before me by Philip G. Terrie, at Charleston, West Virginia, this 23rd day of November, 1976.

My commissior expires September 24, 1978.

/s/ Mary C. Matheny
Notary Public in and for
Kanawha County, West
Virginia

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1318

CECLE G. PEARSON,

Appellant,

v.

W. P. DODD; ERNESTINE DODD, his wife; and COLUMBIA GAS TRANSMISSION CORPORATION,

Appellees.

ON APPEAL FROM A DECISION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF OF AMICUS CURIAE

STATE OF WEST VIRGINIA,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1318

CECLE G. PEARSON,

Appellant,

v.

W. P. DODD; ERNESTINE DODD, his wife; and COLUMBIA GAS TRANSMISSION CORPORATION,

Appellees.

ON APPEAL FROM A DECISION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF OF AMICUS CURIAE

STATEMENT OF INTEREST

This appeal challenges the West Virginia tax sale procedures as violating the due process clause of the Fourteenth Amendment. The State of West Virginia has attempted to provide a tax sale procedure that is both consistent with due process and efficient in its collection of tax revenue. To defend the integrity of this procedure and to preserve its sanctity, the State of West Virginia, by its Attorney General, submits this brief *amicus curiae.*

SUMMARY OF ARGUMENT

The State of West Virginia respectfully submits that the appellant herein was not denied due process of law because she failed to exercise the "due vigilance" which this Court said was required of a taxpayer in *Longyear v. Toolan*, 209 U.S. 414 (1908). In the instant case, if the appellant had made any attempt to pay her taxes for a period of almost four and one-half years, she would have learned of the tax status of the property and could have effected redemption thereof prior to confirmation of the sale by the Deputy Commissioner of Forfeited and Delinquent Lands. Due process of law, the State submits, was afforded the appellant for four and one-half years at every step in the proceedings which culminated in the West Virginia Court's confirmation of the sale to Dodd. The State further submits that the appellant was not denied due process of law because, at the time of notice of publication of the deputy commissioner's suit in which the subject property was included, she had been totally divested of all right, title and interest therein and absolute title thereto was vested in the State of West Virginia.

It is further submitted that West Virginia Code 11A-3-8 does not operate as a statute of limitations to prevent a former owner from attacking the validity of a tax sale. To the contrary, it is a limitation on a statutory entitlement to redeem delinquent property, previously sold to the State, within eighteen months from the date of such sale. It is also further submitted by the State of West Virginia that its statutory procedure for disposing of delinquent real estate is in complete accord with concepts of procedural due process adhered to by this Court in its decisions over

the past eighty years. Therefore, the State of West Virginia respectfully asks, if this Court decides to overrule its prior decisions and decides that West Virginia Code 11A-4-12 denies due process of law to a former owner whose property has been sold as a result of nonpayment of taxes, that such decision will have no retroactive application.

ARGUMENT

I.

INTRODUCTION: STATUTORY PROCEDURE FOR TAX SALES.

The State's interest in having and maintaining an orderly system of enforcement of its tax claims was well stated by the West Virginia Legislature in its "Declaration of legislative purpose and policy," contained in West Virginia Code 11A-3-1, wherein it stated that:

> "In view of the paramount necessity of providing regular tax income for the State, county and municipal governments, particularly for school purposes; and in view of the fact that tax delinquency, aside from being a burden on the taxpayers of the State, seriously impairs the rendering of these essential services; and in view of the further fact that delinquent land, with its attendant problems made acute by the events of the past decade, not only constitutes a public liability, but also represents a failure on the part of delinquent private owners to bear a fair share of the costs of government; now, therefore, the legislature declares that its purpose in the enactment of this and the following article [§11A-4-1 et seq.] is threefold: First, to provide

for the speedy and expeditious enforcement of the tax claims of the State and its subdivisions; second, to provide for the transfer of delinquent lands to those more responsive to, or better able to bear, the duties of citizenship than were the former owners; and third, in furtherance of the policy favoring the security of land titles, to establish an efficient procedure that will quickly and finally dispose of all claims of the delinquent former owner and secure to the new owner the full benefit of his purchase."

The method of collection and the enforcement of property taxes in the State of West Virginia are substantially as follows:

First, Article XIII, Section 6, of the Constitution of West Virginia provides, in pertinent part, that:

"It shall be the duty of every owner of land, or of an undivided interest therein, to have such land, or such undivided interest therein, entered on the land books of the county in which it, or a part of it, is situated, and to cause himself to be charged with taxes legally levied thereon and pay the same. * * *"

This constitutional requirement is further embraced in West Virginia Code 11A-4-2, which provides as follows:

"It is the duty of the owner of land to have his land entered for taxation on the landbooks of the appropriate county, have himself charged with the taxes due thereon, and pay the same. Land which for any five successive years shall not have been so entered and charged shall by operation of law, without any proceedings therefor, be forfeited to the State as provided in section 6, article XIII of the Constitution, and shall thereafter be subject to transfer or sale under the provisions of sections 3 and 4 of such article."

Article XIII, Section 4, of the Constitution of West Virginia provides that:

"All lands in this State, waste and unappropriated, or heretofore or hereafter for any cause forfeited, or treated as forfeited, or escheated to the state of Virginia, or this State, or purchased by either and become irredeemable, not redeemed, released, transferred or otherwise disposed of, the title whereto shall remain in this State till such sale as is hereinafter mentioned be made, shall by proceedings in the circuit court of the county in which the lands, or a part thereof, are situated, be sold to the highest bidder."

Therefore, the law is clear that it is the duty of the landowner to have his land entered on the land books for taxation, to have himself charged with taxes, and to pay the same. In the event the landowner fails to pay his taxes for any year, such property becomes delinquent and, therefore, subject to sale under the following procedure. After April 1 of each year, the sheriff publishes a notice to the effect that taxes assessed for the previous year have become delinquent, and that, unless paid by April 30, will be included for publication in the delinquent lists. W. Va. Code 11A-2-10a. The sheriff is then required to prepare the delinquent lists on or before May 1 following the year for which the taxes were assessed, which list is arranged by districts and alphabetically by name of the person charged. W. Va. Code 11A-2-11. A copy of each of the delinquent lists is required to be posted at the front door of the courthouse of the county for at least two weeks and, in addition thereto, a copy of each list is required to be published one time in two qualified newspapers of opposite politics published in the publication area. Any landowner whose taxes were

delinquent on May 1 may have his name removed from the delinquent lists prior to publication by paying the full amount of taxes then due. W. Va. Code 11A-2-13.

On or before September 10 of each year, the sheriff is required to prepare a second list of delinquent lands which includes all lands in his county still delinquent as of September 1, together with a notice of sale to the effect that the tracts of land described therein will be offered for sale at public auction at a given date and time at the front door of the courthouse. The notice further provides that any tract of land, or undivided interest therein, may be redeemed at any time prior to sale by payment of the amount of taxes, interest, and charges due at the date of redemption. This second delinquent list and notice of sale are required to be published once a week for three successive weeks in two qualified newspapers of opposite politics published in the publication area. W. Va. Code 11A-3-2. The owner of any delinquent real estate or any other person entitled to pay the taxes thereon may redeem at any time prior to sale by payment of the taxes, interest and charges then due. W. Va. Code 11A-2-18.

The sheriff is then required to offer for sale each unredeemed tract of land at public auction to the highest bidder on any Monday after October 14 and before November 23. W. Va. Code 11A-3-4. If no person present bids the amount of taxes, interest, and charges due on any property offered for sale, the sheriff is required to purchase it on behalf of the State for the amount of taxes due. W. Va. Code 11A-3-6. In the event of purchase by the sheriff on behalf of the State, title to such real estate is vested in the State, subject to the right of redemption by the former owner. W. Va. Code 11A-3-7. The former owner of any property

purchased by the State, or any other person who was entitled to pay the taxes thereon, has the right to redeem such property from the State Auditor at any time within eighteen months from the date of purchase. At the end of the eighteen-month period, the property becomes irredeemable and subject to transfer or sale under the provisions of Sections 3 and 4, Article XIII, of the Constitution. W. Va. Code 11A-3-8. The State Auditor is ex-officio State Commissioner of Forfeited and Delinquent Lands and in that capacity is charged with the duty of administering and carrying into execution the laws with respect thereto. W. Va. Code 11A-4-4. The Auditor appoints a deputy commissioner of forfeited and delinquent lands for each county, who is licensed to practice law and who acts as the Auditor's local agent within the county. W. Va. Code 11A-4-5.

Between May 1 and October 1 of each year, the Auditor is required to certify to the circuit court of each county a list of all lands in the county which have become subject to sale. The certification process, for instance, embraces delinquent properties or any interests therein which have become irredeemable as a matter of right and on which no taxes have been paid for the preceding three tax years. For example, the property in issue in this case was sold to the State as a result of nonpayment of taxes for the year 1961 and was certified to the circuit court as subject to sale on August 31, 1964. The list of items certified to the circuit court is made in quadruplicate by the Auditor, who keeps the original. One copy is sent to the clerk of the circuit court, one to the clerk of the county court, and one to the deputy commissioner of forfeited and delinquent lands. W. Va. Code 11A-4-9. After receipt of

the certified list, the deputy commissioner is required to institute a suit or suits in the name of the State of West Virginia for the sale for benefit of the school fund of the lands included in the certified list received from the Auditor. The deputy commissioner is required to institute the suit "as soon as possible" after receipt of the certified list. W. Va. Code 11A-4-10.

In a suit for the sale of forfeited or delinquent land, the deputy commissioner is required to name as a party defendant the former owner in whose name the land was either forefeited or returned delinquent. The deputy commissioner is also required to make all unknown claimants and all other persons who, according to his knowledge, have any interest in any land included in the suit parties defendant. Any person claiming any interest in land included in the suit may intervene at any step in the proceeding by filing a petition in the suit setting forth what interest he or she claims, and such person thereby becomes a party defendant. W. Va. Code 11A-4-11. Once the suit is instituted, the clerk of the circuit court is required to enter an order of publication giving the style of the suit as *State of West Virginia v. A. B. et al.*, which order states that the object of the suit is to obtain a decree of the circuit court ordering that all lands included in the suit be sold for the benefit of the school fund. The order of publication lists such lands by their local description as to each item, the former owner in whose name the land was forfeited or returned delinquent and the names of any other defendants which may be interested therein. The order of publication further requires that all named defendants and unknown parties interested in any of the lands included in the suit appear within one month after the date of the first

publication and protect their interests. Such order of publication is required to be published once a week for three successive weeks in two qualified newspapers of opposite politics published in the county.

The provision for service of process by publication is contained in West Virginia Code 11A-4-12, the last paragraph of which statute reads as follows:

> "In view of the fact that the State has absolute title to all forfeited land, to all land sold to the State for nonpayment of taxes and become irredeemable, to all escheated land, and to all waste and unappropriated land, and must under the Constitution have such an absolute title before the land may be sold for the benefit of the school fund; and in view of the fact that the former owner of any such land, or any person claiming under him, has no further interest therein nor rights in respect thereto except such privilege of redemption as may be extended to him by the legislature as an act of grace; and in view of the further fact that all parties known and unknown who may claim an interest in any of the lands included in the suit are given notice thereof by the order of publication provided for above; therefore, the legislature deems it both expedient and necessary to provide that failure to name any such person as a defendant shall in nowise affect the validity of any of the proceedings in the suit for the sale of the State's title to such land; and in view of the fact that the supreme court of appeals in a decision just rendered has held that there is no constitutional requirement that the former owner or any other interested person be personally served with process in a suit for the sale for the benefit of the school fund of lands that are and must be the absolute property of the State; and in view of the further fact that in its last previous enactment of this section the legislature had no

intention of requiring that personal service of process on named defendants in such a suit should be a mandatory condition precedent to the validity of any step or proceeding in such suit, but on the contrary expressly stated that failure to serve the summons on any named defendant should in nowise affect the validity thereof; now therefore, the legislature also deems it both expedient and necessary to provide that the failure to obtain such personal service on any named defendant in any suit instituted under the provisions of this article prior to the effective date hereof [March 11, 1949] shall in no way affect the validity of any step or proceeding in any such suit or the validity of the title acquired by the purchaser of land sold under any decree made or to be made in any such suit."

The suit, as instituted, must contain an averment that all land included therein is subject to sale for the benefit of the school fund in accordance with the Auditor's certification to the circuit court. The suit must also contain a list of the lands included therein which indicates the total amount due as to each item certified and further indicating whether the land is delinquent, forfeited, etc., its location and description, the name of the former owner, and the year of forfeiture or sale to the State. It is further requires that the suit shall state that there may be parties unknown who claim an interest in the lands included therein and, therefore, shall contain a prayer that all the right, title and interest of such unknown claimants who fail to appear and defend be forever foreclosed. If the deputy commissioner learns of any land included in the suit which is not subject to sale, he shall state that fact in his bill and the reasons for his conclusion. In such case, the deputy commissioner shall ask that the court enter

an order dismissing the suit in respect to such land. With respect to all other land included in the suit, the prayer shall be that the court enter a decree ordering the sale thereof for the benefit of the school fund as required by the Constitution of West Virginia. W. Va. Code 11A-4-13. The former owner of any forfeited or delinquent land, or any other person entitled to pay the taxes thereon, may file a petition in such suit with the circuit court or the judge thereof in vacation at any time before the sale is confirmed requesting permission to redeem the land to the extent that title thereto remains in the State. The circuit court may, by decree, permit the petitioner to redeem the land upon payment to the sheriff of the total amount of taxes, interest and charges due thereon on the date of redemption, together with any court costs properly chargeable thereto, which total amount is fixed by the court. When such payment is made, the court enters a decree declaring the redemption of such land by the petitioner so far as title thereto remains in the State and dismisses the suit in respect thereto. If the redemption is effected after sale, the decree also directs the sheriff to return the purchase money to the purchaser. W. Va. Code 11A-4-18. When the court finds that the land is subject to sale for the benefit of the school fund, it enters a decree ordering the land to be sold at public auction by the deputy commissioner at a time and place fixed by the court. W. Va. Code 11A-4-22. For the purpose of encouraging attendance and bidding at the sale, the deputy commissioner is required to publish a notice of sale once a week for three successive weeks in two newspapers of opposite politics in the county. The notice contains a list of all lands to be sold, and each item is set forth by quantity, local description and the

name of the former owner with respect to delinquent land. W. Va. Code 11A-4-23. On the day fixed for sale pursuant to the court's order, the deputy commissioner is required to sell each unredeemed item included in the published list of lands to be sold. The deputy commissioner is required to prepare a report for the circuit court within thirty days after sale showing the disposition of each item ordered to be sold, *i.e.*, whether sold, redeemed before sale, name of purchaser and amount of his bid. W. Va. Code 11A-4-24. The former owner, his heirs or assigns are entitled to any surplus received from the sale in excess of taxes, interest and charges due thereon if they file their claim in the circuit court within two years after the date the sale is confirmed. W. Va. Code 11A-4-28.

"As soon as possible" after the deputy commissioner has filed his report of sale with the clerk of the circuit court, he applies to the court for an order confirming the sale as to each item sold. If the court finds the purchase price to be satisfactory, it enters an order confirming the sale and directing the deputy commissioner to execute and deliver a deed to the purchaser. W. Va. Code 11A-4-31. Upon entry of the order confirming the sale, the former owner's opportunity to redeem is barred for the first time.

The property which is the subject of this suit traveled the foregoing procedural path. Taxes on the property became payable on September 15, 1961. It was sold to the State in 1962 by the Sheriff of Kanawha County as a result of nonpayment of taxes for the year 1961 after being duly published in the Sheriff's delinquent lists as required by West Virginia Code 11A-2-13 and 11A-3-2. It was again included in the Sheriff's delinquent lists which were published in

1963 pursuant to the above-cited Code provisions but was properly suspended from sale by the Sheriff in accordance with West Virginia Code 11A-3-5 because of the prior sale to the State. The property appeared on the land books of Kanawha County for the year 1963 with the notation "Sold to the State 1961" with no taxes extended thereon. The property was redeemable as a matter of right in the State Auditor's office from December of 1962 until April 30, 1964, at which time it became irredeemable and, therefore, subject to sale under the provisions of Sections 3 and 4, Article XIII, of the Constitution. On August 31, 1964, the State Auditor, as ex-officio State Commissioner of Forfeited and Delinquent Lands, certified the subject property to the Circuit Court of Kanawha County to be sold for the benefit of the school fund under Certification No. 9504 for taxes, interest and charges due thereon for the years 1961 through 1963. The property appeared on the Kanawha County land books for the years 1964 through 1966 with no taxes extended thereon with the notation "Sold to State 1961." The deputy commissioner included the subject property in a delinquent land suit instituted in the Circuit Court of Kanawha County on January 31, 1966, and it was duly entered in an order of publication and published in accordance with the provisions of West Virginia Code 11A-4-12. At the deputy commissioner's sale held on April 26, 1966, the property was sold to W. P. Dodd. The sale to Dodd was confirmed by order of the Circuit Court of Kanawha County entered on May 27, 1966. Therefore, the appellant had from September 15, 1961 to May 27, 1966 to pay the taxes on this property and thereby prevent the ultimate sale to Dodd. West Virginia Code 11A-1-7 forbids payment of current taxes until

delinquent taxes have been paid. Therefore, if in 1962, 1963, 1964, 1965, and at any time prior to May 27, 1966, the appellant had made any attempt to pay her taxes on the subject property, she would have learned its status and could have effected redemption thereof. Therefore, the State respectfully submits that its entire statutory system of disposing of forfeited and delinquent lands should not be overturned because of the lack of responsibility and vigilance on the part of the appellant to see that her taxes due and owing the State of West Virginia were, in fact, paid.

II.

WEST VIRGINIA CODE 11A-4-12 DOES NOT VIOLATE DUE PROCESS OF LAW SINCE AT THE TIME NOTICE BY PUBLICATION IS GIVEN ABSOLUTE TITLE TO THE PROPERTY IS VESTED IN THE STATE OF WEST VIRGINIA.

The appellant asserts that West Virginia Code 11A-4-12 violates the due process clause of the Fourteenth Amendment in that it provides for service of process upon former owners of delinquent lands by publication only and makes no provision for personal service. The Fourteenth Amendment of the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." In defining the scope of the Fourteenth Amendment, this Court has stated:

> "* * * The Fourteenth Amendment's protection of 'property,' however, has never been interpreted to safeguard only the rights of undisputed ownership.

> Rather, it has been read broadly to extend protection to 'any significant property interest,' [Citation omitted] including statutory entitlements. * * *" *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972).

In rejecting the appellant's contention, the West Virginia Supreme Court of Appeals found that, at the time notice was published under West Virginia Code 11A-4-12, the appellant, as a former owner, held no significant property interest or statutory entitlements in the property and, therefore, was not entitled to Fourteenth Amendment protection. *Pearson v. Dodd*, 221 S.E.2d 171, 183 (W. Va. 1975). Therefore, the State of West Virginia contends that the appellant, having not been entitled to due process at the time, could not possibly have been denied due process because of service by publication under West Virginia Code 11A-4-12.

The purpose of the published notice provided for in West Virginia Code 11A-4-12 is to give notice of the suit instituted by the deputy commissioner of forfeited and delinquent lands seeking circuit court permission to sell certain delinquent property for the benefit of the school fund. See p. 8, *supra*. A court proceeding of this nature is required by West Virginia Constitution, Article XIII, Section 4. However, Section 4 also requires that before this court proceeding can be instituted, the State must have absolute title to the property. *State v. Farmers Coal Co.*, 130 W. Va. 1, 10, 43 S.E.2d 625, 631 (1947). In order that the State may acquire absolute title, the Legislature has provided that the owner of the delinquent land will be given eighteen months to redeem the property, starting from the date the property is purchased by the State at the sheriff's

sale. See p. 6, *supra*. When the eighteen-month period expires, absolute title to the property becomes vested in the State (West Virginia Code 11A-3-8), and all claims, interests and rights of the owner are terminated. *Pearson v. Dodd*, 221 S.E.2d 171, 183 (W. Va. 1975). Therefore, at the time the deputy commissioner's suit is instituted, the redemption period has expired, completing the process necessary to vest the State with absolute title. Consequently, since the interests of the owner have been divested, no claims remain to be settled in the deputy commissioner's suit. *Pearson, supra*, at 183. The "suit" itself does not dispose of claims but rather is a procedure required by the West Virginia Constitution to sell property to which the State holds absolute title.

One must wonder why the State provides for any notice of the deputy commissioner's suit, when the State views itself as absolute titleholder prior to the institution of the suit. The answer is not simple. The Legislature once provided that the deputy commissioner's suit would be handled as an administrative function of the court because all issues were settled when the suit was brought, leaving only the sale to be administered. This provision was declared unconstitutional under a strict interpretation of the West Virginia Constitution's mandate of separation of powers. *Sims v. Fisher*, 125 W. Va. 512, 25 S.E.2d 216 (1943). To meet the requirement that the proceeding be "judicial," the Legislature had no choice but to provide for a suit against someone (logically, the former owner) and to provide the technical features of a suit, such as service of process. *See* Colson, *Service Of Process In A Delinquent Lands Proceeding—A Suit That Is Not A Suit*, 54 W. Va. L. Rev. 55, 62 (1951).

In this appeal, the appellant's property, having become delinquent, was sold to the State at the Sheriff's sale because no one present at the sale had bid the amount of taxes, interest and fees due and owing. Upon purchase by the State, the eighteen-month redemption period started to run. When that period expired without the appellant redeeming the property, absolute title to the property vested in the State, cutting off the appellant's interests. Since the property was owned by the State, the deputy commissioner sought to dispose of it by instituting a suit in the circuit court as required by West Virginia Constitution, Article XIII, Section 4.

In light of the foregoing facts, the conclusion is clear. The appellant's property interests and rights were terminated prior to the institution of suit by the deputy commissioner and the publication of notice thereof. Without any significant interest in the property, the appellant could not possibly have been denied due process because of notice by publication.

The State of West Virginia fully acknowledges the requirements of due process and has designed its delinquent land sale procedure accordingly. The State has provided for appropriate due process safeguards for the assessment and collection of taxes and for hearings that provide the taxpayer a forum in which to present his views. In this appeal, however, the appellant does not attack the procedure through which the former owner's rights in the property are terminated and then vested in the State. Rather, the appellant has chosen to attack the State's activities at a point where the divesting procedure has been completed, where the State already *has* absolute title and is simply seeking to dispose of property it already owns. No legal theory

can support the proposition that one who absolutely owns a piece of property must give the former owner of that property notice that he intends to sell it. The published notice provided for in West Virginia Code 11A-4-12 is given by the grace of the Legislature, *Pearson, supra,* at 183, and to fulfill the requirement of West Virginia Constitution, Article XIII, Section 4. See pp. 5,8, *supra.* Clearly, the appellant is not entitled to notice of the deputy commissioner's suit; therefore, the decision of the West Virginia Supreme Court of Appeals should be affirmed.

III.

WEST VIRGINIA CODE 11A-3-8 DOES NOT BAR A FORMER OWNER FROM ATTACKING A TAX SALE BUT RATHER BARS THE OWNER'S RIGHT TO REDEEM THE PROPERTY EIGHTEEN MONTHS AFTER THE PURCHASE OF THE PROPERTY BY THE STATE.

The appellant asserts that West Virginia Code 11A-3-8 denies due process of law to an owner whose property interest has been sold at a tax sale because that statute can be invoked to bar the owner from attacking the sale on due process grounds. Such an assertion is unsubstantiated by either the statute or court decisions. The State of West Virginia contends that the appellant has either misconstrued West Virginia Code 11A-3-8 or has misinterpreted the decision of the West Virginia Supreme Court of Appeals in this case.

West Virginia Code 11A-3-8 contains no language whatsoever that would permit its use as a "statute of

limitations" to bar a constitutional attack on a tax sale. That statute provides, in pertinent part:

> "The former owner of any real estate so purchased by the State, or any other person who was entitled to pay the taxes thereon, may redeem such real estate from the auditor at any time within eighteen months after the date of such purchase. Thereafter such real estate shall be *irredeemable* and subject to transfer or sale under the provisions of sections 3 and 4, article XIII of the Constitution." (Emphasis supplied.)

West Virginia Code 11A-3-8 clearly and unambiguously states that the property owner's right to *redeem* the delinquent property expires eighteen months after the State purchases the land at the sheriff's sale. The meaning of the word "redeem" can be gathered from additional provisions of West Virginia Code 11A-3-8:

> "In order to redeem the person seeking redemption must pay to the auditor such of the following amounts as may be due: (1) The taxes, interest and charges for which the real estate was sold, with interest at the rate of twelve percent per annum from the date of sale. (2) All taxes assessed thereon for the year in which the sale occurred, with interest at the rate of twelve percent per annum from the date on which they became delinquent, except when such taxes are currently due and payable to the sheriff. (3) All taxes except those for the current year which would have been assessed thereon since the sale had the sale not occurred, or which, in the case of land forfeited for nonentry, would have been assessed thereon had the land been properly entered, with interest at the rate of twelve percent per annum from the date on which they would have become delin-

quent. (4) The fee provided by the following section [§11A-3-9] for the issuance by the auditor of the certificate of redemption."

From the statute's use of the word "redeem" and the procedure for redemption, the word "redeem" obviously means the payment of the taxes, interest and fees due and owing on the property; such payment will "redeem" the land. The expiration of the eighteen-month redemption period forecloses the property owner's right to clear the title of the property by paying the outstanding tax indebtedness. West Virginia Code 11A-3-8 does *not* provide that the expiration of the eighteen-month redemption period will foreclose the right of the owner to attack the tax sale proceeding itself.

The appellant has cited no West Virginia decisions that utilize the expiration of the redemption period as a bar to attacks on the validity of the tax sale procedure or the tax deed. The State submits that no such decisions exist. In this case, the West Virginia Supreme Court of Appeals stated that the expiration of the redemption period terminated the appellant's right to redeem her property and vested absolute title in the State. *Pearson, supra,* at 182, 183. The Court did not state that because the redemption period has expired the appellant could no longer assert she was denied due process, but rather that her right to the due process safeguard of notice had terminated upon the expiration of the redemption period. *Pearson, supra,* at 183.

The appellant was permitted to assert a due process attack on the tax sale procedure in question. That attack was considered by the Kanawha County Circuit Court and the West Virginia Supreme Court of Appeals

and decided according to the law and the facts. At no time was the appellant's attack dismissed, but rather was given full and mature consideration. Therefore, the appellant's contention that West Virginia Code 11A-3-8 was utilized to bar a due process attack on the tax sale is groundless.

IV.

NOTICE OF TAX SALE PROCEEDINGS IS SUFFICIENT IF SERVED BY PUBLICATION WHERE THE STATUTES SET FORTH THE STAGES AND TIME ALLOCATED FOR EACH STAGE, PROVIDE A FORUM FOR THE HEARING OF GRIEVANCES AND WHERE THE TAXPAYER HAS A POSITIVE DUTY TO KEEP ABREAST OF THE TAX STATUS OF HIS PROPERTY.

The appellant contends that the West Virginia tax sale procedure denies due process of law because it makes no provision for personal service of notice upon the landowners, but instead relies solely upon notice by publication. This position is contrary to decisions of this Court dealing with the issue.

In *Winona & St. Peter Land Co. v. Minnesota,* 159 U.S. 526 (1895), the Minnesota tax collection statutes provided that a suit listing the delinquent lands be instituted in the district court in order to enforce payment of the outstanding taxes and penalties. Notice of the suit was made by publication for at least two weeks in some paper of general circulation in the county. 159 U.S. at 535. In upholding the validity of published notices, the Court stated:

"All the privileges which are secured to the property owner in respect to the taxes of the

current year are also secured to him in reference to those imposed under amended section 113. He is therefore notified and given an opportunity to be heard before his property is taken from him. Questions of this kind have been repeatedly before this court, and the rule in respect thereto often declared. That rule is that a law authorizing the imposition of a tax or assessment upon property according to its value does not infringe that provision of the 14th Amendment to the Constitution which declares that no state shall deprive any person of property without due process of law, if the owner has an opportunity to question the validity or the amount of it either before that amount is determined or in subsequent proceedings for its collection. [Citations omitted.] That the notice is not personal but by publication is not sufficient to vitiate it. Where, as here, the statute prescribes the court in which and the time at which the various steps in the collection proceedings shall be taken, a notice by publication to all parties interested to appear and defend is suitable and one that sufficiently answers the demand of due process of law. * * *" 159 U.S. at 537, 538.

The West Virginia tax sale procedure outlined in the initial section of this brief fully complies with the directives contained in the *Winona* decision. See pp. 3-14, *supra*. The West Virginia law provides that the taxpayer may protest the classification of his property to the assessor and the State Tax Commissioner at any time up to and including the time the county court sits as a Board of Equalization and Review, which would be up to February 28 of each year. W. Va. Code 11-3-24a. The county court sits as a Board of Equalization and Review to which a taxpayer may ask for corrections in the amount of the assessment. W. Va. Code 11-3-24. The taxpayer can appeal these various determinations as

a matter of right to the circuit court within thirty days of the adjournment of the Board of Equalization and Review. W. Va. Code 11-3-25. Depending upon the stage of the proceedings, the West Virginia statutes provide for publication of notice for one week in some stages to three weeks in others. W. Va. Code 11A-2-13 and 11A-3-2.

In *Leigh v. Green*, 193 U.S. 79 (1904), the Court reaffirmed its position. Upholding notice by publication in a tax sale, the Court stated:

> "The principles applicable which may be deduced from the authorities we think lead to this result: Where the state seeks directly or by authorization to others to sell land for taxes upon proceedings to enforce a lien for the payment thereof, it may proceed directly against the land within the jurisdiction of the court, and a notice which permits all interested, who are 'so minded,' to ascertain that it is to be subjected to sale to answer for taxes, and to appear and be heard, whether to be found within the jurisdiction or not, is due process of law within the 14th Amendment to the Constitution." 193 U.S. at 92, 93.

Importantly, the Court noted that notice by publication was sufficient enough to permit those who are "so minded" to ascertain that their property is subject to sale for taxes. At least by implication, the Court acknowledged that a property owner must assert some effort to discover the tax status of his property.

The property owner's duty implied by *Leigh* was fully amplified by *Longyear v. Toolan*, 209 U.S. 414 (1908), a case involving a tax sale procedure practically identical to the West Virginia procedure. In *Longyear*, the Michigan statutes provided a board of review to convene after the assessments were made to correct and

approve the assessments and to hear the complaints of the taxpayer. Thereafter, at a time set by statute, the taxes would become delinquent and the property subject to sale with a redemption period after the sale. Notice of the sale was made by publication. The appellant contended that the substitution of notice by publication for personal service violated due process of law. In response, the Court stated:

> "* * * It has been shown that the Michigan law provides a board of review, which holds sessions on days fixed by the law, where every person whose property is on the provisional assessment roll submitted by the supervisor may be heard to correct the assessment. It would seem that this opportunity for hearing, coupled with the provision for setting aside the sale within one year after notice of it, which has been stated, satisfies the requirement of due process of law made by the 14th Amendment, and that the state may be left to enforce the collection of the taxes as it chooses. But we pass this question without deciding it, simply observing that, in Winona & St. P. Land Co. v. Minnesota, * * * it was said, * * * that the 14th Amendment was not violated 'if the owner has an opportunity to question the validity or the amount of it either before that amount is determined or in subsequent proceedings for its collection.' If it be assumed that the delinquent taxpayer, who has already had an opportunity to be heard upon the assessment of the tax upon his property, is entitled to further notice of the pendency of proceedings to sell the land in satisfaction of the tax lien, then the statute before us requires a sufficient notice. It is no objection that the notice was only by publication. * * * 209 U.S. at 417, 418.

The Court stated further:

> "* * * If he [the taxpayer] exercises due vigilance, he cannot fail to learn of their pendency, and that full opportunity to defend is afforded to him. This satisfies the demands of due process of law* * *." 209 U.S. at 418.

The Court clearly required the property owner to use "due vigilance" to investigate and ascertain the tax status of his property. As noted earlier, the West Virginia law provides several forums in which a taxpayer can appear to contest the assessment and classification of the property. See p. 22, *supra*. The designation of time periods by the West Virginia statutes is similar to those used in *Longyear* and found to be sufficient, *i.e.*, "on or before the 3d Monday in May," "as soon as practicable after the 1st day of June," etc. A West Virginia property owner exercising due vigilance in investigating the tax status of his property cannot help but learn of that status.

The appellant cites several cases in support of her position that notice by publication alone is insufficient to meet due process. While respectful of the wisdom of these decisions, they all lack the single most vital element present in this appeal: None of these cases deal with a regularly occurring, yearly tax on real estate. The cases cited by the appellant deal with the settlement of rights between private parties, with service of process upon incompetents or incarcerated persons, or with tax cases in which the tax is irregular and more esoteric. On the other hand, the property tax involved in this appeal occurs regularly each year and is part of the common experience of every landowner. Moreover, a tax collection system by its very nature requires that the individual property owner exercise a greater degree

of effort and vigilance to keep updated on the tax status of his property. No such duty exists in any of the cases cited by the appellant.

For example, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), dealt with the judicial settlement of accounts of a common trust fund. Such a suit is between private parties seeking to settle private rights and is not a common occurrence for the average citizen. The statute involved provided that the settlements would occur triennially, while the West Virginia statutes provide with greater specificity when various stages in the tax sale proceedings will occur. Most importantly, there is no positive duty upon the beneficiary of a trust fund to keep abreast of the status of that fund; however such a duty exists for a taxpayer. Likewise, cases dealing with bankruptcies, condemnation proceedings and special water districts are distinguishable because they occur irregularly and thus cannot be anticipated by a common citizen.

The record in this appeal indicates that the appellant's lack of due vigilance in keeping updated on the tax status of her property and in paying the taxes due was so excessive as to border upon a blatant disregard of the law. The appellant's husband, who took care of the appellant's property taxes, was aware that property taxes were assessed annually and that failure to pay the taxes would result in a tax sale of the property. (A. 45.) Therefore, the State asserts that the notice by publication of the tax sale was sufficient and the appellant's alleged failure to learn of the sale was due to her own lack of responsibility.

V.

IF THE COURT DECIDES THAT WEST VIRGINIA CODE 11A-4-12 VIOLATES DUE PROCESS, THAT DECISION SHOULD STATE THAT IT IS NOT RETROACTIVELY APPLICABLE IN ORDER TO PREVENT CONFUSION CONCERNING THE VALIDITY OF TAX DEEDS WHICH HAVE NOW BECOME FINAL.

In the event this Court declares the West Virginia delinquent land sales procedure violative of due process, the State respectfully requests that the decision contain a statement limiting its retroactive application solely to the present case. That the Court has the power to deny retroactive application is clear. *Chicot Co. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 (1940).

A. The retroactive application of the Court's decision should be considered at this time because of the nature of the consequences which the decision will generate.

Though the issue of retroactive application is not specifically before the Court, consideration of the issue at this time is not premature because of the immediate, substantial and widespread consequences which the decision will generate. There are twenty-one jurisdictions, including West Virginia, that rely primarily on notice by publication to effect a tax sale.

In those jurisdictions, as in West Virginia, many land titles are derived from a tax deed. A decision by this Court invalidating the procedure by which these tax

deeds were obtained places in doubt the validity of the present land titles based on the tax deeds. As a result, the doubtful land titles will become unmarketable, investors will be reluctant to improve the land and the income generated from the land will not be readily disposable; such a state of confusion will exist until lengthy court proceedings finally determine who shall prevail. West Virginia records maintained in the State Auditor's office disclose a yearly average of 1607 tracts of land certified to circuit courts for sale for the benefit of the school fund for the past ten years alone.

Clearly, in light of these considerations, the Court must give guidance to those who administer the rules which the Court sets forth. A definitive statement on retroactivity is necessary at this time so that the decision can be readily and justly applied; the consequences of doing otherwise are simply too great to ignore. Therefore, if the need arises, the State of West Virginia urges the Court to define the extent to which a decision requiring more than notice by publication will be retroactive.

B. The decision should not be retroactive because of the maze of relationships, rights and obligations that have evolved in reliance upon the validity of early concepts of procedural due process.

The Court has recognized that a decision disturbing land titles granted under a system challenged as unconstitutional carries unusual gravity. *King v. Mullins*, 171 U.S. 404, 422 (1898). In *Chicot Co. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940), the Court

further recognized that the actual existence of a statute is an operative fact and that, regardless of whether the statute is later declared unconstitutional, its existence "may have consequences which cannot justly be ignored." The Court at 374 stated:

> "* * * The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, – with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination."

A decision declaring notice solely by publication to be inadequate will have consequences that cannot justly be ignored. The tax sale procedures in issue were designed in compliance with concepts of procedural due process previously enunciated by this Court. Regardless of whether these concepts are now deemed obsolete, the fact remains that binding relationships, rights and obligations have arisen on tax deeds granted under those tax sale procedures – procedures relied upon, and deemed final and fair when written. By granting retroactive effect to its decision, this Court can upset the transactions of several past decades, creating legal tangles which would be practically insurmountable. Therefore, the State of West Virginia urges the Court to deny any retroactive application of its decision, except for this dispute now under consideration.

CONCLUSION

The Supreme Court of Appeals of West Virginia correctly applied the delinquent land statutes of the State with respect to the property formerly owned by the appellant. Such application was clearly consistent with procedural due process concepts as pronounced by this Court in prior decisions. Therefore, the decision of the West Virginia Supreme Court of Appeals should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE OF BRIEF OF AMICUS CURIAE

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

I, JACK C. McCLUNG, DEPUTY ATTORNEY GENERAL, depose and say that on the 1st day of September, 1976, I served three copies of the foregoing Brief of Amicus Curiae filed on behalf of the State of West Virginia in the Supreme Court of Appeals of the United States, upon Cecle G. Pearson, appellant herein, by depositing the same in a United States post office or mail box with first class postage prepaid, addressed to Philip G. Terrie, counsel of record for said Cecle G. Pearson, at his office at 1009 Security Building, Charleston, West Virginia 25301, and further, that I served three copies of the foregoing Brief upon W. P. Dodd and Ernestine Dodd, his wife, appellees herein, by depositing the same in a United States post office or mail box with first class postage prepaid, addressed to William E. Hamb, counsel of record for said W. P. Dodd and Ernestine Dodd, his wife, at his office at 950 Kanawha Boulevard, East, Charleston, West Virginia 25301, and further, that I served three copies of the foregoing Brief upon Columbia Gas Transmission Corporation, appellee herein, by depositing the same in a United States post office or mail box with first class postage prepaid, addressed to William Roy Rice, counsel of record for said Columbia Gas Transmission Corporation, at his office at P. O. Box 1273, Charleston, West Virginia 25325, and also that I served three copies of the foregoing Brief upon Columbia Gas Transmission Corporation, appellee herein, by depositing the same in

a United States post office or mail box with first class postage prepaid, addressed to Thomas E. Morgan, counsel of record for said Columbia Gas Transmission Corporation, at his office at P. O. Box 1273, Charleston, West V rginia 25325.

/s/ Jack C. McClung
Jack C. McClung

Subscribed and sworn to before me by Jack C. McClung, at Charleston, West Virginia, this 1st day of September, 1976.

My commission expires February 11, 1981.

/s/Toni Ann Maxwell
Notary Public in and for
Kanawha County, West Virginia